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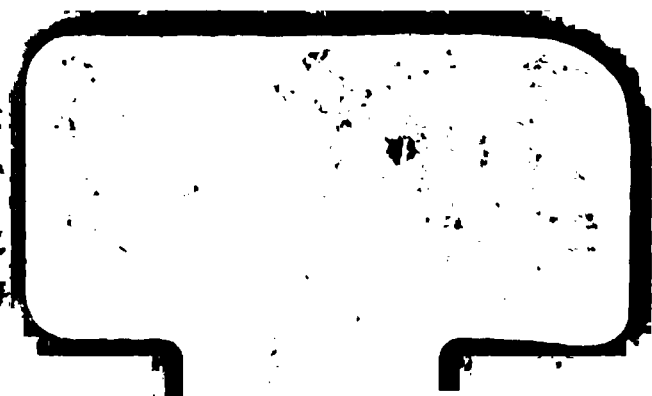
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SPEECHES  
OF  
LORD <sup>John</sup> CAMPBELL,  
AT THE BAR,  
AND  
IN THE HOUSE OF COMMONS;  
WITH  
AN ADDRESS TO THE IRISH BAR  
AS  
LORD CHANCELLOR OF IRELAND.

---

EDINBURGH:  
ADAM AND CHARLES BLACK,  
BOOKSELLERS TO HER MAJESTY:  
AND LONGMAN, BROWN, GREEN, AND LONGMANS,  
LONDON.

MDCCCLXII.

*pb*



LONDON:

THOMAS CORSON HANSARD, PATERNOSTER ROW.

TO  
SIR GEORGE CAMPBELL,  
OF  
EDENWOOD.

---

MY DEAR BROTHER,

You must permit me to prefix your name to this volume, as I have prepared it for publication at your request. You suggested that I might well employ a little of the leisure I now enjoy in revising and editing some of my speeches at the Bar and in Parliament.

I fear that notwithstanding your partial feelings, you may be disappointed. Even if I had been capable of making any Speeches worthy of being remembered, you must be aware that in quiet times, such as we have lived in, opportunities are very rare for delivering addresses in Courts of Justice which can be of permanent public interest;—and I was a law officer of the Crown during the greatest part of the period I had a seat in the House of Commons,—where the usage now is that subordinate Members of the Ad-

ministration take part in debate only when subjects connected with their respective departments are under consideration,—leaving the general defence of the policy of the Government to the gifted individuals who are selected to compose the Cabinet.

However, I offer you some specimens of my efforts—forensic and parliamentary—which perhaps you may not be ashamed of, and which may escape severe censure from my contemporaries. Amidst all the difficulties I have had to encounter, and the disappointments I have experienced, I have never forgotten the motto in the schools at St. Andrew's, our Alma Mater—

*Αἰὲν ἀριστεύειν.*

I should rejoice if I could think that this would be a lasting memorial of a friendship—as warm and as steady as ever united Brothers—which neither time nor distance nor difference of pursuit has been able to interrupt or impair.

It may be that my aspirations and hopes proving delusive, my existence in a short space of time may be known only to my children: but they will be better pleased with the obscurity of their father than if he had gained dishonest fame;—and they will have the consolation to reflect that he never abandoned his principles or his party, and that by remaining true to the cause of civil and religious liberty he always sought the good of his country and the happiness of mankind.



DEDICATION.

v

It delights me to think that, however I may be tossed about on the stormy sea of public life, you in your retreat are in the safe enjoyment of the refined pleasures of literature and science.

“ Eternal blessings crown my earliest friend,  
“ And round his dwelling guardian saints attend.”

Through all the vicissitudes which may yet await me, I shall ever remain,

Your most affectionate Brother,

CAMPBELL.



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# SPEECHES

*&c.*

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Speech for LORD MELBOURNE in the action of THE HONORABLE GEORGE NORTON *v.* LORD MELBOURNE—for Criminal Conversation with the Plaintiff's Wife,—tried in the Court of Common Pleas, before LORD CHIEF JUSTICE TINDAL, on the 23rd June, 1836.

## INTRODUCTION.

WITH the exception of the case of Queen Caroline before the House of Lords, this trial excited more interest than any other which had occurred in England for half a century. In addition to the importance attached to it from the rank of the defendant and the beauty and literary celebrity of the lady, whose conduct was to be investigated, the general feeling was, that the stability of the existing administration depended upon the result;—and if the verdict had been against Lord Melbourne, he could not have retained his position in the councils of his Sovereign. The newspapers had very improperly canvassed the subject before the day of trial—giving most exaggerated representations respecting the evidence to be adduced, and particularly respecting certain letters said to have been discovered by Mr. Norton in his lady's writing desk. The eyes of all Europe were turned to the scene, and couriers were ready to start to the principal courts on the continent with news of the verdict.

The trial began at half past nine in the morning.

Sir W. Follett opened the Plaintiff's case, with his usual tact and ability. The examination of the witnesses for the Plaintiff did not conclude till half past six in the evening. Being somewhat exhausted,\* and rather afraid that I might not have a favourable hearing at so late an hour, I proposed an adjournment till the following day. This was opposed by Sir W. Follett, who urged that the Defendant's counsel should not have farther time to deliberate whether they would call witnesses, or to determine what witnesses they would call.

Lord Chief Justice Tindal said, he thought the trial ought to proceed, unless the Defendant's counsel intended to call a considerable number of witnesses.

The Jury expressed a strong wish that the trial should finish that night.

It was then agreed that the Court should adjourn only for twenty minutes,—at the end of which time the trial proceeded.

\* It so happened that having lain awake from anxiety a great part of the night before, I had fallen asleep towards the morning, and I was not called till near the hour fixed for the commencement of the trial, so that I was obliged to hurry away without breakfast, and found the utmost difficulty in gaining admission to the Court.

## SIR JOHN CAMPBELL, ATTORNEY GENERAL.

MAY IT PLEASE YOUR LORDSHIP,

GENTLEMEN OF THE JURY, I most readily conform to your wish on the question of adjournment; and, personally, I rejoice in the intimation that the trial is now to proceed. After nine hours of unremitting attention, I thought that an interval of repose might possibly enable me better to do justice to the cause of my client, and might prepare you more satisfactorily to appreciate the observations which it will be my duty to submit to you on his behalf. But I shall escape a night of anxiety, and you will have the satisfaction before you leave the Court of pronouncing a verdict of acquittal. Gentlemen, I hail the wish you have expressed as a favourable omen. I most sincerely believe that you are at this moment firmly convinced of the entire innocence of the accused, notwithstanding the incredible evidence of some perjured witnesses; and that you are impatient to declare to the world as soon as possible your opinion of the groundlessness of the charge, and your reprobation of the conspiracy which has been entered into for the purpose of supporting it.

I confess, Gentlemen, I think it would have been more graceful if my friend, Sir W. Follett, instead of opposing, had seconded my application; but such is the nature of the case he has to-day to advocate, that upon this occasion he cannot permit himself to be candid or courteous. From the commencement of the trial till his resistance to the indulgence I craved, he has pretty distinctly shown that he has no confidence in his case;—and I am firmly persuaded that if his opinion had been asked by the Plaintiff before this action was brought, he would strongly have dissuaded him from bringing it, and would earnestly have counselled him to dismiss from his mind the unfounded suspicions instilled into it, and to place undoubting confidence in the purity and affection of his wife.

Gentlemen, I could not ask for adjournment, on the ground that I mean to call witnesses for the Defendant. I at once tell you that for the Defendant I shall call no witnesses, as I feel that the charge against him now stands wholly unsubstantiated, and that the evidence adduced may be shewn to be either utterly false, or entirely consistent with the position that Mrs. Norton is a virtuous woman, and that Lord Melbourne never meditated her dishonour.

My friend has truly said, that this action is in the nature of a criminal prosecution; it is so,—and for a crime of the deepest dye. In this instance, the injury inflicted by a violation of the sanctity of marriage, would be attended with every aggravation—confidence betrayed—hospitality requited with a systematic plan of seduction—a happy home made desolate by him who pretended to share in its harmless pleasures—innocent children, who were daily seen by him caressed by their mother, rendered more than orphans—a woman, not only distinguished for her beauty, her talents, and accomplishments, but once the fondest of wives and the tenderest of parents, reduced to infamy—an adulterous intercourse carried on for years under the roof of the husband, and almost in the presence of the children,—rendering the guilt of the adulterer far more aggravated than if he had prevailed upon the unhappy object of his passion to fly from her husband, to abandon the babe she was nourishing, and to live with him in open prostitution.

As the charge is grave, the evidence ought to be convincing. Frail as our nature is, there is a strong improbability against the commission of such offences, and they can only be established by witnesses of credit, uncontradicted and corroborated. I must likewise remind you of the extreme peril to which parties are exposed against whom such an accusation is brought, and that it is in cases of this sort, above all others, that Juries are called upon to show their discrimination, firmness, and intelligence. A perjured witness swears to what he says he saw pass between the man and woman accused, no one else being in sight. The man cannot be called to contradict the statement, for he is the Defendant; nor the woman, for she is the wife of the Plaintiff. Innocence has still a sure



resource in a British Jury, who will weigh the character of the witness, and comparing the story he tells with all the surrounding circumstances, will discover it to be inconsistent and false.

In this case, the observation I am now going to make is immaterial, as there never was any criminal design or impropriety of conduct on either side ; but, as a general principle, it is the duty of Juries to bear in mind, that an action like the present cannot be supported, unless the crime has been consummated, whatever familiarities short of this may have passed. In the language of Sir W. Scott, " The woman must be proved to have violated not only her delicacy, but her duty ; it is not enough that she has surrendered her mind without having surrendered her person." I must ever condemn any, the slightest, departure from the rules of strict decorum in a married woman, or towards her. It is only by the constant purity of heart and propriety of demeanour becoming a virtuous matron, that she can truly fulfil her marriage vow in the sight of that Being at whose Altar it was pledged ; but for mere levity of conduct, no legal proceeding can be instituted, whatever scandal it may occasion, and however pernicious the example in sapping the foundations of morality. Even the deliberate planner of seduction, however much to be reprobated and shunned, can only be reached by human laws, when his object has been accomplished, and he has triumphed over the last struggles of yielding modesty.

In this case, Gentlemen, nothing ever passed to give alarm or uneasiness to a doating and fastidious husband, from whom nothing was concealed. Mr. Norton, the Plaintiff, is a man of honour ; he was tenderly attached to his wife ; he was fully aware of the intercourse between her and Lord Melbourne ; he never disapproved of it, for he knew it to be innocent.

Need I do more than remind you of the general features of this most extraordinary case ? In the year 1827, the Plaintiff, of a noble family, and presumptive heir to a peerage, but depending upon his exertions in the honourable profession of the law, was united to Miss Sheridan, a young lady who may well be proud of the race from

which she springs, but who had for her dowry, only her beauty, her talents, and her virtues. The union was most auspicious, for they were rich in mutual affection, and that affection continued unabated till the 29th day of March, in the present year, when the unfortunate quarrel took place between them, which led to a separation. During that time, they were blessed with several children, to whom both parents were most fondly attached. According to the evidence of all the witnesses who have been examined, was there ever a more exemplary mother than Mrs. Norton? Notwithstanding her intellectual attainments, and the admiration they excited, she appears to have been devoted to the health and education of her babes,—to have been prouder of them, and to have been better contented when she shewed them to her visitors, than if she had been decked out in the most costly jewels. Mr. and Mrs. Norton occupied a small house suited to their limited income; but here they received an extensive circle of acquaintance, and friends of the highest distinction;—and among these was Lord Melbourne, holding a high office under the government of Lord Grey, and now the first minister of the Crown. Mr. and Mrs. Norton went on in this manner till the fatal day I have mentioned;—living together;—visiting and receiving visits together;—sleeping together;—no change in her attentions or affection towards him;—no change in her devoted attachment to her children.—You remember, Gentlemen, her distraction when she was separated from them, before she knew that any suspicion was to be cast upon her honour; how she forgot her own privations and sufferings, and flying about from house to house, in search of them, seemed to think she could have nothing more to ask from Heaven, if she could again press them to her bosom.

Can this woman be an adulteress? Can she have renounced all the obligations of religion and morality? Can she have forgotten all the feelings of delicacy and decency, which are banished only by necessity from the most degraded of the sex,—and under her husband's roof have daily prostituted her person to another?

Gentlemen, we who practise in Courts of Justice, and are in the habit of hearing causes of this sort tried, know by experience what

is the usual, the invariable effect upon the manners and conduct of a wife when she has listened to the solicitations of a seducer. She loaths and shuns the society of her husband; she neglects all her domestic duties; she becomes indifferent about her children, and she is willing to abandon them that she may escape with her paramour from the home she has dishonoured.

How then are we to account for this charge being preferred?—From political intrigue and malignity. It arises from the baseness of some persons who have poisoned the mind of the unhappy Plaintiff, misrepresenting facts to him, perverting his understanding, and making him a tool in their hands,—seeking to bring discredit on the Defendant in the hope that, his private character being blasted, he may be hurled with disgrace from the high post he now holds—

I will be hanged, if some eternal villain,  
Some busy and insinuating rogue,  
Some cogging cozening slave, to get some office,  
Have not devised this slander.

Gentlemen, this is an attempt which the honorable members of the party in politics opposed to Lord Melbourne would regard with indignation. You heard the name of Sir Robert Peel, the respected leader of that party, called in the morning to serve upon this Jury. We might have struck him from the list in reducing the Special Jury, but on the contrary, there he remains, and I should have rejoiced if he had been now serving as your foreman. He would speedily have seen through this plot, and he would have been eager to defeat and expose it. It is not by a false charge against a rival that he would mount to power.

In his absence I am equally confident, that truth will triumph without knowing or caring to know the political principles of any one of you. It is enough for me to know that I address twelve honest Englishmen. Thank God, Gentlemen, the administration of justice in this country is above all suspicion of taint from party politics, and Jurymen as well as Judges, within these sacred walls,

are only desirous to discover truth and to act according to the dictates of conscience, without regard to the politics, the religion, or the station of the persons on whose rights they are sworn to decide.

Gentlemen, before proceeding to comment more particularly upon the evidence by which this charge is supported, I must point out to you the extreme difficulty in which my client is placed, from its being spread over a period of not less than five years, without notice given to him of the times, or places, or circumstances of his alleged guilt, or of the witnesses by whom that guilt was to be proved. In the Ecclesiastical Court the Libel would contain a full statement of all these particulars, and would furnish an ample opportunity for preparing the defence. In such actions as this in the Courts of Common Law, it almost invariably happens, that the Defendant before coming into Court, knows full well what is to be brought forward against him. The vague and meagre speech of my friend Sir W. Follett, after you were sworn, afforded the first intimation of what we were to meet in this case, and even then information was withheld as much as possible, for I am much mistaken if in the course of his address to you he mentioned the name of a single witness.

But I do not wonder that he was rather shy in naming or describing the witnesses. What are the witnesses on whom he relies? —Discarded servants who never mentioned any impropriety while they remained in the service, and most of whom even admit, that they entertained no suspicion till this inquiry was instituted. Take Mrs. Cumming as an example. During the two years and three months when she was in constant attendance on Mrs. Norton day and night, she says, “I suspected nothing, I thought no harm.” Who, in the name of God! has now made her suspicious? who has put harm into her head? Yet it is mainly upon facts stated by this woman that you are now called upon to infer that during the whole of that period Mrs. Norton was carrying on an adulterous intercourse with Lord Melbourne.

In a law book of high authority which treats of the necessary evidence to support such an action, it is laid down that, “when the

discovery has been made by a servant, it is of importance to show that there has been a prompt communication to the party injured. If it was not till after a quarrel or after a long interval, the evidence labours under great suspicion.”\* Here you find both conditions concurring, on either of which such testimony is to be discredited. The communication instead of being prompt and without malice, is made years after the occurrences described, and when a desire of revenge supplied a motive for falsehood.

It is my duty to point out that in this case, several of the witnesses are evidently actuated by another motive,—the hope of reward;—and I must severely condemn the mode in which they have been dealt with. Why was Fluke, the drunken and dismissed coachman, (now describing himself “as the prime witness against the Premier of England”,) taken from his cellar in Monmouth-street and supplied with money on which he might live idly and luxuriously? Who inspired him with the hopes of fortune which he confesses he entertains? What apology can be offered for taking all the material witnesses to Womersley the seat of Lord Grantley, and detaining them there till the eve of the trial? Do you not believe that they were not only examined, but examined in a way to obtain the answers which were desired? It is barely possible that this might have been the style of interrogation. “Did not Lord Melbourne often call on Mrs. Norton? Was he not very fond of her? You must have seen them on the sofa together? No doubt he kissed her? Did she ever lie down on the hearth rug? During his visits she, of course, adjusted her dress, smoothed her hair and put a little fresh rouge on her cheeks. In compliment to the Premier of England she could do no less,—and by relating these circumstances you not only do justice to Mr. Norton, but confer a great benefit on the public, which must be gratefully remembered.” If such evidence were to be believed, well might we exclaim in the language of one of the greatest of orators and statesmen commenting on the danger from the accusations of discarded domestics, “Our tables and our

\* Phillips on Evidence.

beds are surrounded with snares, our comforts are converted into instruments of terror and alarm.”\*

There is another ground of complaint in the conduct of this cause. My friend, Sir W. Follett, to gain credit with you for fairness, told you he should call before you every witness who could throw light upon the real nature of the intercourse between the parties. How has this promise been performed? To shew that Mr. Norton always treated his wife with attention and kindness, there is called a most respectable gentleman, a witness above all exception, Mr. Darby, the barrister, who was intimate with the family, and who certainly showed that Mr. Norton was an affectionate husband; but who, on cross-examination, stated, that down to the time of the separation his affection was returned by Mrs. Norton, that they continued to live together harmoniously and happily, that she was a fond and tender mother, and that he never observed the slightest change in her demeanour to her children or her husband.

Why were not other witnesses called from whom similar evidence might have been elicited? Is it not incumbent on the Plaintiff honestly to inform the Jury, by the most competent witnesses, of the terms on which he lived with his wife? Who are these witnesses? The relatives of the family. Why, then, is Miss Norton not called? She is the sister of the Plaintiff. She lived under his roof for months in the year 1832, at the very time when the criminal intercourse is supposed to have commenced, and there never has been any difference between her and her brother. Would it not have been most material, that we should have known what she observed, and the opinion she entertained of the conduct of her sister-in-law?

It is surmised that she is at Paris. But there, on the bench, by my Lord Chief Justice Tindal, sits Lord Grantley, the Plaintiff's brother. Why is he not called? He could have given material evidence in support of the action, if it be well-founded; and I should have liked to put a few questions to him, not only respecting Mrs. Norton's exemplary good conduct as a wife and a mother, but likewise respecting the assembling of the witnesses previous to the trial, at

\* Burke.

his country-house, and respecting "the diversions of Wonersh" while they were there.

Sir W. Follett : Why, then, do you not call him ?

Sir J. Campbell : Gentlemen, is not this interruption equally unfair and irregular ? That I may give my learned friend an opportunity of again addressing you, I am to supply the deficiencies of his case, and to call, as my witness, his client's brother—I will not say the originator, but certainly the patron of this action. Is the subtle dexterity of Nisi Prius to be employed in a case like this which we were led to expect was to be conducted with all the gravity, candour, and desire to elucidate, which ought to distinguish a criminal prosecution ? It grieves me to see a man of the eminence and honourable feelings of my learned friend reduced to such shifts.

But again I say, it would have been fair to have put into the witness-box, not only members of the husband's family, but of the lady's. Why not call her sister, Lady Seymour ? Why not call her aunt, Lady Graham ? I will tell you, Gentlemen. Because it might have turned out that they have ever loved and respected her, and that she is now cherished by all her family, without a blush for her conduct, although with many tears for her misfortunes.

But, Gentlemen, I have to complain of the suppression of important evidence, not only as to the general demeanour of the parties, but as to facts connected with the *corpus delicti*. To illustrate the importance of a witness being called or kept back, let me remind you of the advantage I gained by the cross-examination of Mrs. Morris. Before she was called, it was a fact in evidence, that on the 29th of March last, Mrs. Norton ceased to live in her husband's house, and was not allowed to see her children. Coupled with other evidence, and with the statements of my learned friend, it might from thence have been inferred that Mr. Norton having long counted over the damned minutes of him "who doats, yet doubts ; suspects, yet fondly loves," had at last discovered irrefragable proof of his wife's guilt, and of Lord Melbourne, before suspected, being the author of his dishonour. From Mrs. Morris's cross-examination it appears, that Mr. and Mrs. Norton having lived together without

any interruption of their domestic felicity, down to the 29th of March, a sudden quarrel arose between them, and a separation followed, with which Lord Melbourne had as little connection as the Judge presiding at this trial. There was to have been a great gathering of Sheridans and Grahams, at Frampton, the seat of her brother, Mr. Sheridan, in Wiltshire. She intended to have gone there, and to have taken her three children with her. For some reason not explained, Mr. Norton, unfortunately, was not invited. If he had been included in the invitation, in all probability, he would still have been the head of a happy family, and the confiding husband of an unsuspected wife. He was enraged at the supposed slight. Early in the morning, he gave positive orders to Mrs. Morris, that the children should not go; and to prevent Mrs. Norton from taking them with her, which she, perhaps unjustifiably, was strongly inclined to do,—that she might not leave them behind to the care of servants,—that she might show them to her relations,—and that she might enjoy the solace of their caresses,—he sent them to Lord Grantley's house, or lodgings, in Berkeley-street, with a positive injunction that she should be debarred from their sight. Gentlemen, I saw you were deeply impressed with the account given by the witness of Mrs. Norton's distraction and anguish, when, having first gone to Lady Seymour's, she traced the children to Berkeley-street, and was there informed that she could not see them. Seldom has there been drawn a more touching picture of maternal tenderness and distress. Next day, the children were carried to Wonersh, and she has never beheld them more.

The separation, when explained, is wholly inconsistent with the accusation subsequently made, and, I may say, providentially becomes a proof of innocence. If Mrs. Morris had been kept back from an apprehension of the disclosures she might make, some mystery might have appeared to hang about the transaction, and some lurking suspicion of guilt might have been entertained.

Why was not Sophia Gulliver likewise put into the witness-box? She had been the personal attendant of Mrs. Norton for years. I



have proved that she was in Court, subpoenaed here as a witness for the Plaintiff; and guilt there could not be, without her privity. Why is she not examined? What has become of my friend's promise to call every witness whose evidence could assist you in coming to a just verdict?

But we may be told, the Plaintiff cannot incur much blame by abstaining from calling a witness now in the service of Mrs. Norton. What pretence can he offer for not calling Fitness the man-servant, who had been with him during these occurrences, who must have admitted Lord Melbourne with other visitors, and let him out; who was in the house at Storey's Gate at the time of the separation, and who is now actually taking care of that house employed and paid by Mr. Norton? Gentlemen, I am entitled to say he was not called because he would have confirmed Mrs. Morris, and still farther explained the circumstances of the separation, the removal of the children that they might not be carried to Frampton, and the repulses experienced by the distracted mother, when she implored, that she might be permitted again to caress them.

The case being so got up and so conducted, had the facts sworn to by the witnesses been ever so strong, and, if true, conclusive. no Jury would have felt it safe to act upon them, and to pronounce a verdict of guilty. But the evidence when examined is of the most flimsy description; and I must express my unfeigned astonishment, that, assuming as I do the entire innocence of the parties,—witnesses, so picked up and so disciplined, have not made out a more plausible or I should rather say, a less preposterous and less ridiculous case against them.

The first ground on which you were called upon to infer that Lord Melbourne carried on an adulterous intercourse with Mrs. Norton, was the clandestine manner in which he is alleged to have entered the house at Storey's Gate. My learned friend was very eloquent upon this, and, following his instructions, would have had you believe that there being a public door to the house from the Bird Cage Walk, by this entered all who had occasion to go

to the house for an honest purpose ; but that Lord Melbourne, that his visits might be concealed from all the world, slunk in by a secret entrance in Prince's Court :

——“ with his stealthy pace  
Moved like a ghost.”

How did the fact turn out on my cross-examination of the first witness ?—that the supposed secret entrance in Prince's Court is the public outer street door of the house,—No. 2 painted upon it,—with a brass plate, a bell, and a knocker—that this door leads into the hall, and is used by all who have occasion to enter the house, whether tradesmen or visitors, gentle or simple,—and that, although there is an entrance into the house from the Bird Cage Walk, it is private, and opens into the dining-room, being made of glass, and in truth one of the dining-room windows. I am not aware of any evidence of any particular individual ever having used it, and if Lord Melbourne had ever used it, this would have been brought forward as evidence of his guilt. The Rev. William Fletcher Norton, the priest before whom the Plaintiff and his bride plighted their troth at the altar, and who was called to prove that he pronounced the nuptial benediction over them, as often as he afterwards visited them, entered the house in the same manner as Lord Melbourne. Gentlemen, you may remember I ventured to ask him whether in these visits he had any improper views upon Mrs. Norton. The laugh with which the Court re-echoed and in which you could not refrain from joining, shewed that in the opinion of all impartial men the charge was ludicrous. From this early blow my learned friend never rallied.

However, he proceeded with his witnesses and Hannah Veitch was called, who from her accent is evidently a country-woman of mine, and I am glad it will be not necessary for me to make any severe strictures on her testimony. She has left Mrs. Norton's service four years last April, and while there she knows that Lord Melbourne paid frequent visits although “she could never get a look at him.” Now Lord Melbourne's frequent visits have never

been denied or doubted ; but she has shewn nothing of clandestinity about them, and she might often have had *a look at him* if she had opened the door when he rung or knocked. She says she never saw or heard any thing prejudicial to the character of her mistress, and she supplies the deficiency of evidence from Miss Norton not being called, by proving that this virtuous lady, deeply interested in her brother's honour, remained during a visit of weeks or months at Storey's Gate, and instead of remonstrance or complaint, expressed high satisfaction with the domestic felicity which her brother enjoyed.

Next comes Trinette Elliot, a discarded servant of bad character.

Sir W. Follett : No.

Sir J. Campbell : Being a single woman, she ceased to remain in the service of Mrs. Norton, because she was in the family way. She seems to have different notions of morality from my learned friend, for she long tried to deny and conceal her *misfortune*. Gentlemen, I may draw rash inferences, but I cannot help suspecting that if an unmarried woman has a child, she has carried on illicit intercourse with one of the other sex, and that this shows she has not always observed the laws of chastity, the first of female virtues. She was the nursery maid, and she tells you that Lord Melbourne being fond of all the three children, the eldest of whom was born before he had ever seen Mrs. Norton, when he called, it often happened that the bell rang, and she brought down the children to the drawing-room, and by and by the bell again rang, and she carried them up to the nursery. But on one occasion *when the bell had rung*, she saw Lord Melbourne and Mrs. Norton sitting on the sofa, with her hand in his ; and on another occasion *when the bell had rung*, she entered the drawing-room and saw Lord Melbourne kiss Mrs. Norton's cheek. Gentlemen, I have always understood that when any improper familiarities are to take place between the sexes, secrecy and concealment are courted—bars and bolts are used—window-shutters are closed, and blinds are drawn down. You may remember an instance of a youthful monarch being reprimanded by a grave divine for neglecting such precautions. My learned

friend in his opening told us something of bolted doors, but nothing of the sort could he get out from any of the witnesses ; and, on the contrary, they would represent that when any indelicacy was contemplated, proclamation was made, and it was perpetrated *coram populo*. How can I possibly disprove the squeeze and the kiss sworn to by TrINETTE Elliot ? No other person was present except the three infant children. But various others might have intruded on those occasions. The scene of the amorous dalliance suggested to your imagination is the drawing-room on the first floor of a small house, in a public and exposed situation—the door always unlocked and unbolted—and visitors from time to time dropping in. TrINETTE tells you that Mr. and Mrs. Norton kept much company, and that many visitors called at the house besides Lord Melbourne.

She adds a fact, which if true, would throw a reproach upon Mr. Norton's character, to which I conscientiously believe it is not liable—that he disapproved of Lord Melbourne's visits and suspected the honour of his wife, and that on one occasion he flew into a great rage when on coming home he found Lord Melbourne in the drawing-room. If he had entertained such feelings it would have been his duty to have forbidden Lord Melbourne the house, and I believe he would have done so the more eagerly on account of the rank and station of the man he suspected. But she is contradicted on this point by all the other witnesses who have been examined, who all state that down to the time of the separation, Mr. Norton remained on habits of uninterrupted friendship with Lord Melbourne—that by his invitation Lord Melbourne dined at Storey's Gate as often as once a week—and that after dinner they not unfrequently all went to the play together. The witness is contradicted by my friend, Sir W. Follett, who in his address to you, assured you that Mr. Norton was not at all suspicious—that he was under a complete delusion—and that till after the letters had been discovered, when his wife left him, he placed entire confidence in her honor.

But then Gentlemen we have a scene which upon the first blush seems very alarming, and I cannot here deny the facts that are

alleged. Ellen Gibson actually introduces Lord Melbourne into Mrs. Norton's bed-room. There he was—but under what circumstances? Mrs. Norton was exceedingly ill, unable to support herself, and was obliged to be carried from her bed to a sofa in her bed-room. Being smartly dressed, she there received a visit from Lord Melbourne, and probably from various others of her acquaintance. During Lord Melbourne's visit, Miss Gibson tells us the bell rang three times—first on his arrival, to bring in the children—secondly, when they had been some time in the room, to take them out;—and thirdly, soon after, as he was going away, to ask what o'clock it was, and to let him out. My alarm is gone. No one can suggest the possibility of any thing improper having passed on this occasion, and nothing more is indicated than a habit of friendship and intimacy consistent with the most perfect purity of conduct and of sentiment.

The evidence of Elizabeth Gibson the next witness, I denounce as false, incredible, and impossible. She represents, that for many months together—acts of adultery must have been committed in the drawing room—day by day—without any intermission—without a single exception—without regard to the health or state of nerves of either party—irrespective of opportunity—reckless of the peril of interruption. She would have you believe, that every day, or at least six days in the week, as regularly as the sun rose, or the clock struck, Lord Melbourne called at Storey's gate,—Mrs. Norton was neatly dressed to receive him,—her hair smooth,—her cheeks rouged,—her canzon composed;—but that invariably after Lord Melbourne had been with her a certain time in the drawing room, she came up stairs to her own chamber in dishevelled state,—and again smoothed her hair,—retouched her cheeks with rouge,—and readjusted her canzon. The witness was quite sure that all this happened at least six days in the week during all the period she was in the service as lady's maid.

I do not know if my friend will allow me to refer to Debrett's Peerage for the age of the noble Defendant without claiming a reply.

Sir W. Follett. Certainly not.

Sir J. Campbell. Then gentlemen, I will not say that my noble client was born in the year 1779, or how nearly he approaches his grand climacteric. But you may be guided by your own observation, and you may know that instead of being now a gay and gallant young man, he is somewhat "declined into the vale of years." With him "the heyday in the blood is tame." But were he still in *flaming youth*,—is no allowance to be made for satiety—for palled appetite,—for occasional indifference,—for the ebbs as well as flows of passion—for the interruptions of business? I have never heard any imputation upon the present premier, that he has neglected his official duties for his private gratifications;—and surely these daily interviews must some times have been prevented by cabinet councils; by attendance at Court; by preparation for debate in the House of Lords; by receiving deputations in Downing-street; by applications for favours from vacillating opponents; by the thrice told grievances of disappointed friends.

It is this witness likewise, I think who speaks of Mrs. Norton sometimes washing her hands in the middle of the day,—which she could not deny might be accounted for from her mistress being in the habit of drawing with crayons, gardening in her little conservatory, and attending to her infant children. In short, Gentlemen, she shews a determined resolution to bring forward the most innocent actions and appearances as proofs of guilt, and you may safely dismiss her testimony from your mind, as founded on palpable exaggeration, distortion, misrepresentation, and falsehood.

The scene now changes to South-street, Grosvenor-square, the residence of the Defendant, and Bullerman and Saunders tell you of Mrs. Norton having called there. By whom was she taken? By Miss Armstrong—in the carriage of her father Colonel Armstrong. And who is Miss Armstrong? The virtuous daughter of one of the bravest and most distinguished, and most high-minded officers in the British service. Gentlemen, I have proved that Miss Armstrong is in attendance here to-day,—that she is now sitting in an adjoining room,—and by all sorts of entreaties and taunts

I have done what I could to induce my friend to put her into the witness box. And I must say, Gentlemen, that I think it is most cruel to mention her name without giving her the opportunity of explanation, and those who instruct my learned friend know whether this course is not contrary to an engagement entered into when her father's servants were subpoenaed.

But why should I say one word more of the calls in South-street, when I have shewn that on one occasion, at least, Mr. Norton accompanied his wife, and handed her into the house of Lord Melbourne. Mr. Norton knew, and sanctioned similar calls at the house of the Duke of Devonshire, which were equally innocent and unsuspected.

Is it to be said Gentlemen, that a married woman accompanied by her husband, or by a female friend, whose character is admitted to be above all suspicion, may not in broad daylight call at the house of an unmarried man without an inference being drawn that the meeting has been arranged for the purposes of intrigue? Have you never allowed your wives and daughters to dine with a widower, or old bachelor, or to call upon him in the morning to see his pictures,—or to carry him a new publication,—or to arrange a party to the opera? If such visits are to be condemned we must have a new system of manners, founded on the notions of Asiatic seclusion, and I doubt much whether the cause of morality would be advanced by the change.

But we are again hurried back to Storey's-gate, and we are introduced to the "prime witness against the premier of England" as he designates himself. I mean John Fluke. I am sorry to say of this hero, that as he advances in life he recedes from respectability. We have him first as a soldier fighting and wounded at Waterloo; and he was taken to Wornesh from a cellar in Monmouth-street, where he sold old shoes,—having passed through the intermediate stages of a drunken coachman, and a cab driver who absconded from his creditors. He was at last dismissed from the service of Mr. Norton whose witness he now is, for having been so much intoxicated when he ought to have driven Mr. and Mrs.

Norton to a party at Lansdowne House, that after he had several times nearly overturned the carriage, Mr. Norton was himself obliged to mount the box and take the reins in his hand, with his opera hat on his head. He ascribed his discharge chiefly to Mrs. Norton, whom he would not swear that he had not cursed in terms too gross for me to repeat. Indeed, it is remarkable, that though he perfectly remembers what took place five or six years ago, his memory is very frail with respect to occurrences that have happened within a few days. He cannot say he may not have declared since he was subpoenaed here as a witness, that he expected that if the trial went right he should receive five or six hundred pounds, and that he hoped to go down to Scotland and live independent. But this he is obliged unqualifiedly to confess, that for the purpose of being a witness in this cause he was taken from his cellar in Monmouth-street, he gave up his business of selling old shoes, he received at one payment the sum of 10*l*. from the Plaintiff's attorney, and he was carried down to Wornesh with his wife and three children, and entertained at a public house near the mansion of Lord Grantley. I can hardly imagine, that he has now played his part according to the rehearsal, or he would have been struck out of the piece. I cannot bring myself to think that my learned friend knowing beforehand the story he now tells, would seriously ask you to believe it. What is his story?—That having occasion to go into the drawing room with tickets for the play which he had been sent for, he knocked and received no answer—he a second time knocked and received no answer—he then opened the door which was unbolted—when he beheld Lord Melbourne sitting on a chair—his elbows on his knees, and his hands supporting his head—gazing at Mrs. Norton.—Mrs. Norton lying stretched out on the floor on her side,—her feet towards the door—her head resting on the side of the hearth rug near the fire—and her cloathes raised so as to shew one of her legs naked above the knee. Did they at last start up in confusion when awakened from their trance? No! they respectively maintained their position. “She looked at my lord and “my lord looked at her. I delivered my message but neither of



"them gave me an answer. I turned round and retired from the  
"room. Mrs. Norton nodded to me when I delivered my message,  
"but did not speak. When I withdrew, Lord Melbourne was  
"sitting as I have described him, and Mrs. Norton on the floor."—

"——There he sate like ane bewitched  
And thought his very een enriched."

Such eagerness and delight might have been expected; but the description of the witness displays no degree of excitement or enthusiasm. The Lover all the while continued sitting on his chair,—his elbows on his knees, and his hands supporting his head—gazing at Mrs. Norton. Instead of resembling a Spartan virgin taught to bare her thigh to attract the notice of the other sex, she seems rather to have been like the marble statue of a nymph recumbent on its pedestal in a semisupine posture, undergoing the examination and criticism of an antiquary.

But on another occasion the witness saw more lively symptoms of affection between them. He says he went into the drawing room at the same time with Lord Melbourne, when he heard him say "How do you dear Carry"—and she kissed him. Such are the notions of the ex-cab-driver and ex-vendor of old shoes, of love and intrigue in high life; and thus he expects to earn his five or six hundred pounds and to go down to Scotland and live independent!

There is only one other witness on whose evidence I have to comment, Mrs. Cummings, alias Mrs. Owen. I know not whether my friend chivalrously stands up for the purity of her character, but she unblushingly acknowledges she was a mother without being a wife. She justifies herself, however, by representing that Owen the tailor alone could boast of her favours, "it was all owing to the tailor," and he would have married her if she had liked. A new Eloise.—

"How oft when prest to marriage have I said  
Curse on all laws but those which love has made,  
Not Cæsar's Empress would I deign to prove,  
No! make me mistress to the man I love."

I was glad for the sake of my friend Mr. Thesiger, whose valuable assistance I have in this cause, and by whom she was so ably cross-examined, that she states so strongly her attachment and fidelity to the tailor; for it appears, that she was living as a servant in the family of my learned friend when her shape exhibited the necessity for the marriage she declined. But why should I attack her? She told you in the most explicit terms, that during all the time she was in the service of Mrs. Norton she never saw anything which excited any suspicion of that lady's conduct; and she now only comes to tell you what she then saw. If this at the time excited no suspicion in her mind, why should it now excite suspicion in yours? All the facts which she states to you, (if none of them are invented, if none are misrepresented or exaggerated) are entirely consistent with the supposition of Mrs. Norton being one of the most virtuous of womankind. If want of chastity is to be inferred from the symptoms and appearances she has described, I venture to say, Gentlemen, that the reputation of your wives and daughters, though chaste as unsunned snow, may be in the greatest peril. There is no safety for the honour of woman if by examining a female attendant it may be shewn, that there were symptoms and appearances to be accounted for by deranged health and constitutional weakness—and these are to be admitted as proofs of moral depravity.

An attempt by such means to fix guilt upon the innocent, must excite in your minds a mixed emotion of disgust and indignation. It is alarming, it is appalling, to think, that the reckless and unprincipled may institute such inquiries in an open court respecting any matron, and that what delicacy would lead her to conceal from her beloved husband, the father of her children, on whose faithful bosom she lays her head, revealing to him every secret feeling of her heart,—is to be examined into before a judge and jury,—is to be commented upon by lawyers in the hearing of a crowded audience,—and is to be blazoned in every newspaper in the kingdom.

“O heaven that such companions thou'dst unfold;  
And put in every honest hand a whip,  
To lash the rascal naked through the world.”

Having now disposed of the whole of the parol evidence, I come to Lord Melbourne's letters to Mrs. Norton, which are said to prove the adultery. Gentlemen, I confess that when I entered the court, I had upon this subject some anxiety. Never doubting the innocence of the parties, I was afraid from the rumours confidently circulated of the discovery of letters, that from the intimacy subsisting between them, he might in writing to her have unguardedly used some expression liable to be misconstrued. My suspense was at an end and my relief unspeakable, when my learned friend had read the three letters from Lord Melbourne, and told you he had no others to produce.

It has been stated to the world in the most positive and audacious manner, that letters had been discovered from Lord Melbourne written in the most passionate terms, and containing the fullest proof of successful gallantry. Nay, more, they were to shew him guilty of public delinquency by the disclosure of secrets of state to his mistress, and a shameful abuse of the patronage of the crown. In short they were to cover him with disgrace as a man and a minister.

My learned friend certainly introduced the letters more modestly, but still he represented that they could not have been written in the course of an innocent acquaintance, and that although he had no direct evidence of guilt by witnesses, the deficiency would thus be supplied by the letters—

—————Quisnam

Delator? Quibus indiciis, quo teste, probavit?

Nil horum. Verbosa et grandis epistola venit.

Of Lord Melbourne's letters to Mrs. Norton, three are selected as the most impassioned, most tell-tale, and most damnatory.

The first is in these words—

“I will call at about half past four or five.

Yours,

MELBOURNE.”

The next—

“How are you? I shall not be able to come to-day; I probably shall to-morrow.

Yours,

MELBOURNE.”

The last—

“No house to-day. I will call after the levee, about four or half past. If you wish it later let me know. I will then explain about going to Vauxhall.

Yours,

MELBOURNE.”

Gentlemen, there is no one better knows how to struggle with difficulties than my learned friend, and, keeping within the rules of honorable practice, to make the worse appear the better reason. I dare say, therefore, he judged well in producing these letters; but I must say, that, in my own judgment, they only strikingly shew the ridiculous nothingness of the case of his infatuated client.

The character of the intercourse between the parties might well be ascertained from their correspondence, and if there had been anything improper in that intercourse, in their correspondence there would be traces of it.

The first letter it may be said is an assignation;—and it is so,—at the house of the husband,—where the paramour so anxious to be concealed was to ring and knock at the street-door in open day,—was to be admitted by the husband’s footman,—was to be shown into the drawing-room—where other visitors were or might be admitted,—where the nurserymaid with her husband’s children would probably be sent for;—and no bolt or bar interposing, the husband himself might enter when he chose.

Shall it be said that the second displays an earnest and agonizing solicitude about her health. “How are you?” However he does not display much impatience to fly into her arms. “I shall not be able to come to-day! I *probably* shall to-morrow.” Gentlemen I cannot help thinking that this displays much more of listlessness

than of love,—that the writing of it, short as it is, was probably interrupted by a yawn,—and that it is a fair specimen of the humdrum style of common acquaintanceship.

The last letter is rather more animated,—announcing intelligence always very agreeable to me, that there is no House, and speculating (as I sometimes do in such an event) on making a party to Vauxhall,—which I dare say was made with the concurrence of Mr. Norton, Lord and Lady Seymour and other relations and friends agreeing to join it,—where they were perhaps met by some of you, accompanied by your wives, daughters and friends, who may have made a similar party.

But Sir W. Follett gravely says, these letters show a great and unwarrantable degree of affection, because they do not begin and end with the words, “My Dear Mrs. Norton,” or any other tender appellative. There must be much love concealed, because none is exhibited. It seems there may be latent love, like latent heat, in the midst of icy coldness. There was the fulminating powder of love in each of these packets, which was to go off, and set Mrs. Norton in a blaze, the moment she opened them. My learned friend, perhaps, thinks it doubtful whether they might not be brought within the late Act of Parliament against the clandestine sending of dangerous combustibles, and, Gentlemen, an indictment against Lord Melbourne on that statute, would not be more ridiculous, than this action.

I have now only to make a few observations on the letters of Mrs. Norton to the Plaintiff. Gentlemen, I might have objected to the admissibility of these letters. The rule of law is, that letters from the wife to the husband may be admitted on a trial like this *if written before the adulterous intercourse is alleged to have begun*, for the purpose of showing the terms of affection on which they lived, previous to the time when their happiness was blasted by forming an acquaintance with the adulterer. These letters, Gentlemen, were all written while Lord Melbourne was making the visits now charged as criminal, and chiefly in the year 1835,—after every occurrence given in evidence, from which you are required to draw

an inference of guilt—long after the cause of action, if it exists, had accrued.

Such confidence had I in my case, that I waived all objection to the letters—without knowing what they were, but knowing that truth is consistent, and that if they were genuine, they would serve me. I now rejoice in the course I adopted; for having heard them read, I am sure you consider, that they strongly corroborate the innocence of Mrs. Norton; nay, they prove to demonstration, that if she wrote them, the charge against her is calumnious and false.

They do answer the purpose for which, professedly, they were introduced, by shewing a mutual attachment between Mr. and Mrs. Norton, and that they lived happily together, devotedly fond of the children, with which Providence had blessed their union. But the letters shew that this happiness was enjoyed by them for years after their intimacy with Lord Melbourne, and after the happening of every circumstance from which my learned friend calls upon you to conclude, that he had alienated her affections from her husband, corrupted her innocence, and made her home a scene of systematic vice and depravity. The playfulness, the artless graces, the touching tenderness of these letters, could only proceed from that serenity of mind, which is the reward of virtue. As a specimen, I may read you an extract from her letter written in the year 1835, beginning, "My Dearest Georgie," in which she gives her husband, then at a distance, an account of their children, and the hopeful quickness of repartee exhibited by them. "I was shewing the opera-glass you gave me to the boys, and Brinney said, 'What do you see?' 'I see your dear little dirty face,' quoth I; I then handed it to him, and said, 'What do you see?' 'I see your dear big dirty face,' said he. Was'nt it quick and funny? The other laughed amazingly at this filial impertinence. Spencie's good things I must not omit. We were sitting with Charlie, and he was dull. 'Now' says he, 'let's resign.' 'What do you mean?' said I. 'People says *resign*, when they *goes out*,' quoth he. So much for living with ministers."

You may remember another letter in which she states how she

saw one of the boys washed and put to bed after his gambols with the beagle puppy and the pet lamb.

Juryman : We do remember her letters.

Sir J. Campbell : Then, Gentlemen, I might peril my cause on your answer to this question. Can these be the letters of an unchaste wife? Are they not bright with the sunshine of innocence? By the constitution of the human mind, and the eternal decrees of Providence, is guilt consistent with the feelings she displays? If she had forgotten her marriage vow, would she, not only have loathed her husband, but have become indifferent about his offspring? would not discord have sprung up between them, and regardless of all her duties, would she not have gone on sinking lower and lower in depravity and wretchedness? On the contrary, they continued to lead the happy and innocent life of those—

“ Whom gentler stars unite, and in one fate,  
Their hearts, their fortunes, and their beings blend.”

Gentlemen, my observations on the evidence are now brought to a close, and I have little more to say beyond thanking you for the patient and indulgent attention with which you have favoured me.

When I consider what interests are at stake, it is impossible for me not to feel the deepest apprehension lest the merits of the cause should suffer from deficiency in the advocate.

The effect of your verdict on the councils of the Sovereign, of which so much has been said out of doors, and the anticipation of which may have given rise to the action, can have no influence on your minds ;—and with me all public considerations are merged in anxiety for the private character and happiness of the individuals whose fate is involved in the result of this memorable trial.

To Lord Melbourne, Gentlemen, it is probably a matter of no great moment, whether he is to retain or lose the power and patronage of office ; but it is of the last importance to him that he should not be regarded as a deliberate seducer, as a systematic libertine, as a contemnor of all the rules of religion and of honour. I believe I may say of him, in the words applied to a predecessor of his, that

in the midst of a stormy administration, with many political opponents, he is almost without a personal enemy. You may judge how he is beloved by his private friends, who have the opportunity of witnessing the frankness of his demeanour, the simplicity as well as elegance of his manners, the unaffected hilarity of his disposition, and his unceasing respect for the feelings of others, arising from the goodness of his heart.

Gentlemen, I would become counsel for the Plaintiff, and pleading for his true interests, implore you to rescue him from the danger to which he has wantonly exposed himself, and the delusion into which he has been led. He is trifling with his happiness. He is throwing a pearl away. Without just grounds he has proceeded to this extremity. Restore him to content and the tranquil mind. Tell him by your verdict that his wife is worthy of the unbounded confidence he reposed in her, and instead of being false to wedlock, is heavenly true.

I cannot contemplate without deep emotion the effect of your verdict upon the fate of this lady. In the pride of beauty, in the exuberance of youthful spirits, flattered by the admirers of her genius, she may have excited envy, and may not have borne her triumph with uniform moderation and meekness; but her principles have been unshaken, her heart has been pure,—as a wife her conduct has been irreproachable,—as a mother she has set a bright example to her sex. If necessary, some indulgent allowance might have been asked for her manners, without questioning her honour. My learned friend referred to the race from which she is sprung. Her family presents I believe an unparalleled instance of genius being displayed by five successive generations—mixed up at times with eccentricity—but ever free from dishonesty. The first member of the family of whom I have any knowledge was the friend of Swift, and is thus characterized by Lord Cork: “Indigent and cheerful; yet in the midst of all poverty still a quibbler, a punster, a fiddler and a wit, who never suffered a day to pass without a rebus, an anagram, or a madrigal.” In spite of some eccentricities the friend of Swift was a man of integrity as well as a man of



genius. His son, the friend of Johnson, was known for his attainments in literature, and for his unbending principles, although now and then quarrelling with his best friends, and among others with the great Lexicographer. According to Boswell, the first of biographers, Johnson, however, always said of him "Sheridan is a good man." I have only to pronounce the name of his son Richard Brinsley Sheridan to recall to your recollection that he was the greatest dramatist and one of the greatest orators and statesmen who appeared in the reign of George III., and that in the midst of pressing pecuniary embarrassments brought on by imprudence, he yielded to no temptation, and was ever true to his party and his principles. His son was cut off in early life, but not before he had given earnest of talents, which, if he had been spared, would have added fresh lustre to the name he bore. That son left three infant daughters destined to be the ornament and the charm of English society in the present reign;—Lady Seymour, whose name was mentioned by several of the witnesses, married to the eldest son of the Duke of Somerset, and Mrs. Blackwood, married to the heir of the Barony of Dufferin; the third is Mrs. Norton, now on her trial before you—for weal or for woe. Through what vicissitudes has she passed! Once a helpless orphan, depending like her sisters on the kindness of relations, she became destined like them to wear a coronet. How brilliant did her lot appear on the morning of the fatal day when she was deprived of her children! Young, beautiful, accomplished, highly connected, enjoying great literary reputation from her works—enjoying what was far more valuable, the esteem and confidence of her husband,—her acquaintance courted by poets and statesmen,—listening to the prattle of her lisping boys as they strove for her caresses! What must have been her subsequent sufferings? Figure to yourselves her surprise and her horror when the charge of infidelity was first brought against her.

But worse remains behind,—unless you stand forward as her protectors. Hitherto she has been received, consoled, and cherished by her relations and friends. If you pronounce the word,

she must henceforth be looked upon as a guilty creature—she must be abandoned by all and become an outcast—death or loss of reason being her only prospect of relief. Conscious innocence, an appeal to the Searcher of all hearts, may support a Christian in the last mortal agony ; but what woman, however firm-minded and submissive, could live to be spurned as polluted from the arms of a husband she still loves,—to be debarred for ever from the sight of her children, who, instead of being brought up to honour her, are to blush for her supposed crime, when they are old enough to understand the stain she has brought upon them—to be regarded as a disgrace by all who can count her in their line—and if she flies to foreign climes, still to be under the apprehension that she may be pointed to by the slow unmoving finger of scorn. I read in your countenances, Gentlemen, your undoubting opinion of her spotless innocence, and your desire now to publish this opinion to the world.

But before I conclude, I am bound according to the express instructions I have received from Lord Melbourne, to declare in his name, and in the most solemn and emphatic manner, that he is not guilty of the charge brought against him, and that neither by word or deed has he ever abused the confidence reposed in him by Mr. Norton. I know well, Gentlemen, that you cannot act upon this assertion, and I do not seek to influence by it that verdict which you have sworn to find according to the evidence.—Look to the evidence, and if it supports this charge, I desire you, regardless of the consequences, to find a verdict for the Plaintiff with exemplary damages. But the evidence instead of bringing home guilt to the accused, only reflects disgrace on the accuser. The accusation is built simply on the frequent visits of Lord Melbourne ;—and he by adverse fate being now without domestic ties, you are called upon to believe and to act upon the belief, that he could not without immoral designs and indulgences retire from court formality and insincerity,—from the noise of faction and from the cares of state, to enjoy the repose of private life—to taste the pleasures of refined conversation—and to witness the sports

of children who would neither flatter nor deceive him. Might he not have

“ ——— his happier hour

Of social converse ill exchanged for power ?”

Gentlemen, this action must have originated in a scheme to overthrow the present Government by traducing the private character of its chief, though the honour of an innocent female, and the happiness of a respectable family should be the necessary sacrifice. There is not more moral guilt in the assassinations and poisonings to which the struggles of political parties have given rise in other countries and other ages. This attempt, if successful, would be more cruel to its victims—by allowing them to live when life has become a burthen, and more dangerous to society, as it would be perpetrating a great crime through the forms of law, and committing sacrilege in the very temple of justice. But such an attempt never can succeed till Englishmen have lost the love of truth, the fairness, the firmness, by which they have ever been distinguished, and until trial by jury, hitherto the palladium of our rights and liberties, shall be converted into an instrument of our degradation and oppression.

Gentlemen, I sit down in the calm conviction, that you will without a moment's hesitation free my client from the groundless charge brought against him,—and in the fond hope, which I may be pardoned for expressing, that the Plaintiff—at the first look of tenderness being forgiven by his wife the unfounded suspicions he has entertained,—his children may in a few hours be clinging round their reconciled parents,—and that his home may again become, and may long continue, the abode of undoubting love, and domestic felicity.\*

\* After the evidence had been summed up by Lord Chief Justice Tindal, the jury immediately found a verdict for the Defendant—which called forth loud rejoicings in the Court and the adjoining Hall.

As a further proof of the public sympathy, it may be mentioned, that, without, of course, meaning to pay any personal compliment, when Sir John Campbell concluded his address to the jury, there was a shout of applause which could with difficulty be restrained, and that when he entered the House of Commons between eleven and twelve o'clock at night after the verdict had been pronounced, he was received with loud cheers as he walked up to his place.

# **SPEECH FOR MEDHURST.**

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**The QUEEN v MEDHURST—Central Criminal Court, April  
13th, 1839.**

## **INTRODUCTION.**

**FRANCIS HASTINGS MEDHURST** aged nineteen, the eldest son of a very respectable and wealthy family, while residing as a pupil with the Reverend Frederick Sturmer at Hays in Middlesex, had unfortunately stabbed with a knife a fellow pupil, Mr. Joseph Alsop, rather younger than himself, and in a few days death ensued. Great horror was excited in the public mind, stories were circulated in the public press, that Mr. Medhurst who had been born and received his early education in Sicily, from a grudge against the deceased had purchased the knife as an instrument of vengeance, and having fastened a quarrel upon him had cruelly assassinated him in the premeditated fray. A coroner's jury being assembled, found a verdict against Mr. Medhurst for wilful murder. He immediately surrendered himself to justice, but the magistrates before whom he was brought, on investigating the facts, thought the case amounted only to manslaughter, and committed him to be tried for that offence. At the following sessions of the Central Criminal court, an indictment for murder was preferred against him. The Grand Jury however, after an explanation of the law upon the

subject from the learned Recorder of London, negatived the bill as to murder and found it only for manslaughter

It was generally understood that the charge of murder would be abandoned, and the counsel for the prosecution were not unwilling to adopt this course : but at the meeting of the court, the presiding Judges, in the discharge of their duty, insisted that the trial for murder should proceed on the Coroner's inquest, and that a jury must decide on the quality of the offence. I was thrown into a state of great alarm and consternation,—having conceived that after the finding of the Grand Jury my client's life could be in no danger,—and being now under apprehension that the petty jury to be impannelled might from prejudice, or influenced by the cry against the introduction of secret stabbing into this country, be very unfavourably disposed towards him. Although the prosecution was conducted with great candor and moderation by Sir Frederick Pollock, there were symptoms exhibited by some of the Jury which increased my alarm, and at the close of the evidence for the crown, the result seemed very doubtful.

## SIR JOHN CAMPBELL, ATTORNEY GENERAL.

MAY IT PLEASE YOUR LORDSHIPS,

GENTLEMEN OF THE JURY, although deeply and conscientiously convinced of the innocence of my client, no language could describe the anxiety with which I rise to address you. My situation is new and appalling. While preparing to discharge my duty as counsel for the prisoner, and when I entered the court this morning, I had believed that the only charge to be brought against him before you was,—that without premeditation or malice he had caused the death of a fellow creature,—and that the utmost peril to which he was exposed was imprisonment—from which he would have been restored to his friends and to society without any lasting stain upon his character. By the decision of the Judges, (to which I must submissively bow,) he now stands before you upon his deliverance for life or death. He is charged with the crime of Wilful Murder,—and, if the charge were true,—one of the foulest murders since the days of him who did the first murder. It must be supposed that in early youth,—when only kind, generous, and affectionate feelings were to be expected in his bosom, it rankled with hatred and revenge, and that he formed the deliberate purpose to take the life of one who had not yet reached manhood,—the companion of his studies—with whom he had planned many boyish enterprizes,—his playfellow,—his friend.

“Murder most foul as in the best it is,  
But this most foul, strange and unnatural.”

Gentlemen, if you, in the painful discharge of your awful duties, were to feel yourselves bound to pronounce a verdict of Guilty against him, he could have no hope of mercy. Not only must he be

hurried out of this world as unfit to live in it, but his name would be handed down to distant generations, as an unparalleled instance of early depravity.

Remember, however, Gentlemen, that of this charge he is already acquitted, not only by the decision of the enlightened Magistrates of Middlesex, who refused to commit him for a higher crime than manslaughter, but by the Grand Jury of the county, who, in entire conformity to the law as expounded to them from the bench, rejected the bill of indictment for Murder,—thereby declaring that all the evidence for the prosecution—even taken *ex-parte*—did not so much as make out a case to put him upon his trial for this atrocious offence.

He is charged with murder only by the Coroner's inquest,—on which, technically speaking, he may be lawfully tried and convicted, but which I must use the freedom to say, in no degree rebuts the presumption of innocence. For the deliberate verdict of twelve Englishmen on their oaths, after listening to a sound exposition of the law, I have the most unfeigned respect; but for the inquest of a coroner's jury in a case of sudden death I have no respect at all. The constable gets together whom he can first find—no qualification being required in the jurymen. They meet amidst the fumes of an ale-house. Whatever rumours have been spread in the neighbourhood respecting the fate of the deceased and the supposed murderer they have heard;—and the more horrible and improbable, such rumours are, they are the more apt to believe them. To calm their imaginations—they are by law required to view the dead body, with its convulsed countenance and ghastly wounds, before they begin their investigation;—and the Coroner who ought as Judge to explain to them nice legal distinctions, and to enlighten their understandings, may be a low legal practitioner, unqualified for such duties,—or a person wholly uninitiated in law, who has been elected to the office by popular arts, and who seeks to inflame the prejudices of the Jury instead of allaying them. In extenuation of the recklessness with which a verdict of wilful murder may be pronounced by such a tribunal, I should mention

that the Jury and the Coroner are not aware of the solemnity or consequences of the act about which they are employed. Nor is this to be wondered at, for I believe I may positively assert that in the annals of the administration of criminal justice in this country, there is not a single instance of a conviction for murder on the finding of a Coroner's inquest. In the vast majority of instances, the instrument is quashed for gross informality; and if there be any ground for the charge, an indictment for murder is found by a Grand Jury.

This institution Gentlemen, is one of the safeguards of the rights and privileges of Englishmen, which I hope no innovator will ever touch with sacrilegious hand. It has been proposed to do away with Grand Juries,—composed of men the most eminent for station, and intelligence, guided in their deliberations by the judges of the land,—and to give the power of instituting prosecutions and putting a man upon his trial on the gravest charges to the magistrate, who takes the examinations, or to a public prosecutor, to be appointed by the Crown. I have shewn myself no enemy to legal reform; but this is a change which I have always resisted, and shall continue to resist;—and I trust it will long be the boast of this country, that in the case of offences inducing a forfeiture of life or property, the Attorney-general of the Crown, and the highest Court of criminal jurisdiction have no such power, and no man can be called upon to hold up his hand and plead to an accusation, till at least twelve of his fellow subjects, having deliberated upon his case, have expressed an opinion, that he ought to answer the charge. This is a noble protection against the malice of individuals, against the oppression of Government, and against haste and intemperance in the administration of penal law. In reality and in truth, Gentlemen, of this protection is my unfortunate client deprived; and he is exposed to the peril—to the suspense—to the obloquy of a trial on such a charge as this, after a Grand Jury have pronounced him innocent. But in your candour, in your calmness, in your discrimination, in your love of justice, he implicitly confides.



Now, Gentlemen, I must draw your attention more particularly to the nature of the accusation, and the evidence by which it is supported.

The inquest avers, that the prisoner of his malice aforethought assaulted Joseph Alsop, and of his malice aforethought struck and wounded him the said Joseph Alsop, and the said Joseph Alsop of his malice aforethought did kill and murder. The charge is *murder*—a crime at which human nature shudders, and which by the law of man and of God is to be punished with death. “Whoso sheddeth man’s blood, by man shall his blood be shed.” But to constitute this crime, malice aforethought must be alleged and proved. It is not enough, that one human being directly causes the death of another—or the skilful surgeon who performs an operation terminating fatally, would be a murderer. Design even will not create criminality—or not only the public executioner, but the defender of his country, who kills a public enemy in open battle, would be a murderer. Nor will the causing of death through culpable negligence, amount to murder—no, Gentlemen, nor the causing of death upon sudden provocation, and in the heat of blood. The law mercifully makes allowance for human infirmity, and only inflicts its last penalty when there is proof of deliberate malice—where there has been a premeditated purpose—where a mortal wound is maliciously inflicted without provocation and without excuse. Now there is here not only a total want of proof of malice, but there are various facts in evidence by which malice is positively and affirmatively, negatived, and disproved.

What is substantially the narrative of the witnesses respecting the death of the unfortunate Alsop? The Reverend Frederick Sturmer, curate of Hayes, had for pupils three young gentlemen, Medhurst, Dallison, and Alsop. There had been a difference between them, Dallison and Alsop taking part against Medhurst, and refusing to speak to him,—but he had expressed a wish to be reconciled to them. On the morning of Saturday, the 9th of March, the three breakfasted in company with Mr. and Mrs. Sturmer, and Dallison immediately after set off on a visit to his friends. Medhurst going up to the

room in which Dallison and he slept, found the glass of his watch broken. This watch he had received as the last gift of an affectionate father; and he supposed that the glass had been intentionally broken by Dallison. With his watch in one hand, and in the other a large walking stick which he usually carried, he entered the parlour in which Alsop was sitting with Mr. Sturmer,—and, addressing the latter, said, “What do you think that blackguard who has just gone away has done. He has broken the glass of my watch.” Alsop exclaimed, “You are a liar and a blackguard for saying so.” Medhurst struck him with the stick. Alsop, who was taller and stouter, closed upon him, wrested the stick from him, struck him with it, and when they were eight feet apart, was again advancing with the stick in both his hands—to strike with the whole force of his body another blow,—which might have proved fatal. Medhurst at that moment took the knife from his pocket—touched a spring at which it flew open,—and the fatal wound was inflicted. Mr. Sturmer without making any effort to separate or to appease, or to control them, had left the room. Alsop fell. Medhurst cried out “Oh God”—ran for help—assisted him to his bed-chamber—applied a bandage to staunch the bleeding from the wound, expressed a desire that medical advice should be obtained—and offered at his own expense to send an express to the relations of Alsop to bring them to his presence. All human care was vain. The wound,—treated as it was,—proved mortal, and on the 14th day of March Alsop expired, having exchanged forgiveness with Medhurst, and with his last breath acquitted him of all malicious intention.

Could the coroner be justified in telling the jury (if he did so), that this was a case of Murder,—although the accused be a gentleman by birth and breeding, and although he did carry a dangerous weapon? Gentlemen, I by no means defend the carrying of such weapons. I agree with my learned Friend Sir Frederick Pollock, in wishing that there were a law against the sale of them. But however improper the fashion and construction of the knife, remember, Gentlemen, it was not a stiletto purchased by an assassin. The prisoner had been in possession of it before the original cool-

ness between him and the deceased arose, and had openly used it in his favourite amusement of carpentering. The boast he is proved to have uttered respecting its power, clearly shews that he did not obtain or keep it for any secret or unlawful purpose.

I must respectfully caution you, Gentlemen, not to allow its formidable appearance to make any unfavourable impression upon you with respect to the guilt of the prisoner. My Friend, Sir F. Pollock, has conducted the prosecution with great moderation, and I am sure had no intention of biassing your judgments when he exhibited to you the instrument of death. But I could not witness without some uneasiness, the sensation produced upon you when he touched the spring, and the long blade flew open—with spots of rust upon it. In the course of my experience in courts of justice I have observed, that such sights never fail to make a dangerous impression, and in conducting prosecutions for murder I have been very cautious in introducing them. Deep sympathy is immediately excited for the deceased, which may unconsciously lead to indignation against the hand by which the instrument was held, and to something like a desire for judicial vengeance. “Blood will have blood.” Such sights we know from the celebrated lines of our great northern poet, are the best calculated even to create superstitious horror, and entirely to disturb the empire of reason.

“Five tomahawks, with, blood red rusted ;  
Five scymitars, with murder crusted,  
A garter which a babe had strangled,  
A knife a father’s throat had mangled,  
Whom his own son of life bereft  
The grey hairs yet stack to the heft.”

But Gentlemen you will calmly ask yourselves this question. Where is the premeditation? Where is the malice aforethought? When the party rose from the breakfast table on the Saturday morning,—when Medhurst went up into his room, what was passing in his mind? Did he harbour any design against the life of Alsop? There can not be a doubt, gentlemen, that he expected the day would be spent in improving studies or innocent amusements. He had been

at variance with his companions, but he had expressed a desire, and he cherished a hope of speedy reconciliation. "Who can control his fate?" He finds the glass of the watch, which he so much valued—(as he thought) purposely smashed. He was incensed,—but not against Alsop. He considered Dallison, who had left the place, the author of the mischief,—and it was against Dallison he went to complain to Mr. Sturmer. When he entered the parlor Alsop was there; but to Sturmer alone did he address himself, and the words he used could have no reference to Alsop. All idea of premeditated design against Alsop is at an end. Nor can you severely blame my unfortunate client for what—without premeditation—most unexpectedly followed. It is with the greatest reluctance that I say anything against that unfortunate young man, Joseph Alsop. Nothing ever was exhibited more beautiful, more generous, more christian, more edifying—than his demeanor from the moment he received the blow till he breathed his last. But I am compelled in the discharge of my duty and from a regard to truth and justice to say, that he must be strongly condemned for the language he then held, and that personal chastisement might have been anticipated from the insult, he then offered to his companion. "You are a liar and a blackguard."

Sir F. Pollock, "for saying so."

Sir J. Campbell, for saying what? Nothing addressed to Alsop or concerning him. In this unhappy controversy Alsop undoubtedly was the aggressor. Thus assailed, what course was my client to pursue? Was he tamely to submit to the insult? and how was he to resent it? He was in his twentieth year, but both parties were to be considered *in statu pupillari*, and it will hardly be supposed that, appealing to the code of honour, a requisition was to be made through the intervention of a friend for an apology, or an hostile meeting. Was he to bring an action for defamation? Was he to wait that he might seek redress by a complaint to Mr. Sturmer who had fled? Gentlemen, he did what you could hardly regret that a son of yours should do under similar circumstances. Being called "a liar and a blackguard," he instantly struck the party so

insulting him—with the walking stick which he held in his hand. The stick was wrested from him, and a blow from it was inflicted upon him by his more athletic antagonist. Here again, Gentlemen, I am most reluctantly compelled to censure the unhappy Alsop. If he did not apologize, he ought at least to have been satisfied and to have withdrawn. But being at the distance of eight feet, he grasped the stick with both hands, raised it above his head, and was rushing forward to strike. Medhurst could not retreat, he was standing against the wall. He could not escape, Alsop stood opposite the door and intercepted his flight. In that awful extremity he resorted to his sole means of defence. The knife was drawn from his pocket, the blade was opened and presented as a protection. Alsop still advanced, and the fatal wound was received.

If a desire of vengeance and not self-defence had been the motive of the prisoner, what then would have been his demeanor? His passion would have been gratified. He would have enjoyed at least that momentary satisfaction, though to be followed by remorse, which is felt in accomplishing an object however wicked. But he was instantly horror-struck, and “Oh God,” he exclaimed. No other utterance could he find for grief and anguish.

From that moment he could not have shown more sympathy and tenderness for the sufferings of the deceased, or a more earnest and eager wish for his recovery, had he been a beloved brother who by some mischance had met a similar fate from the hand of a stranger. Nor was this from any sordid regard to his own safety. I believe that though unconscious of ever having entertained any bad feeling towards Alsop, and certain that the offence with which he now stands charged never could be truly imputed to him, he would willingly have sacrificed his own existence to rescue his friend from the consequences of the wound of which he was the unfortunate cause. Need I remind you how kindly he conducted him to his chamber, how affectionately he hung over him in bed, trying to assuage his pain, and the earnestness he displayed that the sufferer might be surrounded by his relatives? If my client had felt any consciousness of guilt or alarm for his own safety, he might at

any time have fled to await the event. But he continued by the sick bed to the last ; he still remained in the house when the scene had closed,—and being informed of the finding of the Coroner's Jury accusing him of murder, he voluntarily went to a magistrate and surrendered himself, that he might be tried by God and his Country.

Is this the conduct of a murderer?—of one who thirsted for blood?—who planned assassination?—who had such a wicked and depraved heart, that without provocation or excuse, he would take the life of him, who, with the exception of a boyish dispute which might have been easily appeased, had never done any thing to offend him, and whom he had always loved and cherished ?

But, Gentlemen, there is a witness whose evidence you must believe, and whose evidence conclusively proves the innocence of my client. That witness is the unfortunate Alsop,—whose voice is heard by you from the grave. I am afraid, Gentlemen, to approach the touching scene of the reconciliation and mutual forgiveness of these two young men,—whose fate, though different, is perhaps equally to be deplored,—lest I should be overpowered by my feelings, and entirely disqualified for the farther discharge of my duty before you. When it was announced to Alsop that his recovery was hopeless, he pressed the hand of Medhurst ;—embraced him ;—exclaimed, “ We were both to blame, and I forgive you,”—asked and received forgiveness. The last words he ever spoke amounted to a verdict of Not Guilty in favour of my client. When his eye was becoming dim, his hand cold, and his voice tremulous, and it was evident to himself and those around him that his earthly career was rapidly drawing to a close, the surgeon asked him if Medhurst had been actuated by malice ? He answered, — “ Certainly not,” and expired. That declaration of innocence was not accompanied by the form of a judicial oath to speak the truth. But is it entitled to less credit ? He knew that he had nothing to hope or to fear on this side the grave ; that he was speedily to appear in the immediate presence of his Maker, and that his eternal doom was to be sealed according to the purity of

his heart, and the sincerity of his parting words. Are you to suppose then, that from a false generosity, from a spurious chivalry, he wished to screen guilt from punishment, and that with this view he perverted the truth, and went out of the world pronouncing a falsehood? As a true christian, he knew that forgiveness is the condition on which we hope to be forgiven; and imitating the example of the Divine Founder of our religion, he would have been ready in his last moments to pray for mercy from above upon his murderer if he had come to his end by the blow of premeditation and malice: But he knew that he spoke before the Searcher of all hearts,—that he was forthwith to render an account of his words and of his actions to the God of truth,—and that when the commandment of God against murder has been violated, the safety of God's creatures requires that the penalty affixed to this crime should be enforced by human laws.

He now calls upon you to acquit the prisoner. Perhaps we may without irreverence suppose that he is conscious of this solemn proceeding, and his gentle spirit, if it can by any mysterious means influence your minds, must inspire you with the conviction, that the accused was free from malice, and that his act was unaccompanied by that criminal intention which alone constitutes guilt.

His surviving relatives,—although the prosecutors,—must rejoice in the acquittal. They have done their duty to his memory by instituting the prosecution, and laying the case fairly before you. The candour and humanity of my learned friend truly represent the spirit by which they are actuated, and shew that none would more deeply regret, that from any excess of good feeling in the jury,—from any preconceived opinion,—from any unfounded rumour,—from any desire to discountenance the practice of carrying secret weapons, my client should be in undue peril. It is impossible not to sympathize with them for the heavy loss they have sustained in the untimely death of a young man of such promise,—so likely to be a credit and a blessing to his family. It must be some consolation to them to reflect that he did not die unprepared; that repentance there is every reason to hope atoned for any

youthful errors he might have committed, and that for his own sake, the change is not to be deplored,—as he is taken from the evil to come—withdrawn to peace and happiness—from a world beset by temptation—where the most prosperous meet with many privations, disappointments, and sorrows.

But what must be the feelings of the relations of Medhurst,—his widowed mother,—his little brothers and sisters,—old enough to know the nature of the charge brought against him, and its awful consequences? He, Gentlemen, as you may perceive, behaves with firmness and resolution, in the consciousness of innocence,—ready with God's assistance to meet his fate whatever it may be. What a group would *they* now present to you? Till they suddenly heard the astounding intelligence that he was committed to prison on a charge of murder, they had ever found him quiet, mild, gentle, dutiful, and affectionate.—They looked forward to an early visit from him,—when as usual he would fly into his mother's arms,—and his brothers and sisters clinging round him to kiss him, he would remark how they had increased in stature and beauty since the family was last assembled. These innocents are unacquainted with legal distinctions,—they are incapable of appreciating the degree of danger to which by law he may be exposed;—in an agony of tears they await your verdict. But, Gentlemen, their suspense and their suffering will be recompensed by the joy of that moment when you restore him to their embrace, all danger over, and his character unsullied.

It is my duty, however, to tell you, that though prepared at once to acquit on the charge of murder, it does not necessarily follow that you are to pronounce a general verdict of Not Guilty. The prisoner may still be chargeable with the lesser offence of manslaughter,—which would not affect his life. But there are two grounds, Gentlemen, on both, or either, of which I submit to you, that you may entirely acquit,—without violating the rules of law which it is of importance to all should be respected.

You observed, Gentlemen, that I put various questions to the surgeons respecting the treatment of the wound, and that the answers



were somewhat contradictory. Now, Gentlemen, I admit that even if I had established to your entire satisfaction that the surgeon called in was unskilful, that his treatment was injudicious and that by a different course there would have been a much better chance of recovery, this would not amount to a defence. But it will be for you, Gentlemen, to say, whether I have not done a great deal more and satisfied you that the wound in itself was not dangerous to life, and whether the inflammation which terminated fatally, was not brought on by an improper suture, and above all by the tight bandages,—condemned by all the scientific witnesses. If that should be your opinion, Gentlemen, no part of the charge is supported.

At all events, Gentlemen, if instant death had taken place, the question would arise, whether under the extraordinary circumstances of the case, the prisoner for self-defence was not justified in opening the knife,—as he might have been in drawing a sword if he had had one by his side—so as to make this a case of justifiable homicide. The law certainly permits the use of a mortal weapon for self-defence, only in the last extremity. There must be a reasonable apprehension of immediate danger to life from violence—there must be no opportunity of flight or escape,—and the use of the mortal weapon must appear the only means of preservation. But you will say, whether all these conditions did not concur in this case at the moment of alarm when the knife was resorted to, for the purpose of warding off the impending danger. Alsop considerably taller and stouter than his antagonist, had got possession of the large stick and was evidently in a fit of violent passion; for not satisfied with inflicting one blow,—after retreating, that he might add force to the next,—he was advancing with the instrument of vengeance in both hands;—and who will say it was a chimerical fear that a blow so inflicted upon a weak young man wholly unarmed and defenceless might prove fatal? It must be admitted, that farther retreat or flight was impossible, and that no other weapon offensive or defensive except the one resorted to was within the reach of the prisoner. There is no reason to suppose that even then he intended any thing against the life of the assailant. He more probably

thought that the production of the weapon would stop the assault, and he could not anticipate that Alsop, though enraged, would rush forward upon it and meet his fate.

I have too much respect for you to do more than allude to a topic which has been most improperly used out of doors to prejudice my client—that on account of his Italian or Sicilian education, he must be considered trained to the use of the stiletto. If an Italian or Sicilian were on his trial before you, he would not suffer from such a surmise. Much less can it bias a Jury of Englishmen, against a young Englishman born of English parents and reared in the bosom of an English family.

Gentlemen, with respect to the quality of the act and the distinctions between manslaughter and justifiable homicide, you will receive the directions of the very learned Judge who presides. It is your province to apply the evidence to the law; but I desire that you will take the law from him as he shall expound it;—and I trust, that both on the law and fact, you may conscientiously pronounce a verdict of Not Guilty.

I ought not to conclude without expressing my abhorrence of the conduct of the Rev. Mr. Sturmer in this transaction. In moral guilt he is far more culpable than either of the two young men who quarrelled before him. By an exertion of bodily strength if necessary, it was his duty to have parted them:—but an admonition, or even a look from their master, would have been enough to restrain them. He fled,—and by his timidity or recklessness, the life of one was lost, and the life and reputation of the other are put in peril.

Gentlemen, I cannot refrain from pointing out to you, the combination of occurrences, over which my unhappy client had no control, and which brought about the misfortune which none can more deeply lament. On the morning in question Dallison quitted Mr. Sturmer's,—the glass of Medhurst's watch was found broken—when he went to complain to Mr. Sturmer, Alsop was in the room,—Alsop grossly insulted him and attempted to wreak vengeance upon him for resenting the insult—Mr. Stur-

mer shamefully violated his duty in not preserving order between them. Was ever any one in his situation so much the victim of circumstances, and so little to be censured for intentional wrong?

But, Gentlemen, I trust you will feel yourselves justified in pronouncing a verdict which will at once transfer him from the bar of this court to liberty and the arms of his affectionate relations; that his education being finished, he will at once enter upon the duties of life; and that there lies before him a long career of usefulness, respectability and happiness. You not only will acquit him of the capital charge, but by a general verdict of Not Guilty, you will rescue him from the peril of being sentenced by the court to be banished for ever from his native country, and to spend the rest of his days among the vilest of malefactors. He has already suffered much, and I fear to his last hour must carry about with him the painful recollection of having, though unintentionally, caused the death of a friend and a school-fellow. Of this, Gentlemen, I am sure that whenever his story is truly told, he will be thought more unfortunate than criminal, and more to be pitied than condemned.

To your hands, Gentlemen, I now commit his fate—with an earnest prayer to Almighty God, that your verdict may be founded on justice, and tempered with mercy.\*

\* The Jury acquitted the prisoner of murder, but found him guilty of man-slaughter, and he was sentenced to imprisonment for three years.

# PARLIAMENTARY REFORM.

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## INTRODUCTION.

I HAD from my earliest years of reflection been a strenuous friend to Parliamentary Reform. The degrading state of the representation in Scotland was extremely humiliating and mortifying to every Scotsman who had any value for free institutions, or any regard for the honour of his native country. Although Scotland was without the shadow of free election either in counties or towns,—in England there certainly was a very considerable remnant of the ancient representative system. In the counties, notwithstanding the exclusion of all copyholders and leaseholders, there was a numerous and independent constituency, and in many cities and boroughs there was an ample opportunity for the effective manifestation of public opinion in the choice of representatives. But in this part of the island likewise some change had become indispensable, to adapt our institutions to our actual circumstances, and to revive the respect which must exist in every well-governed country for the supreme legislative authority. The scandal created by the transferable nomination boroughs, and the discontent arising from the great towns, such as Manchester and Birmingham, not being represented at all, would have disabled the House of Commons from efficiently performing its duty, however virtuous its Members, and

however patriotic its acts. But the misgovernment of the country and many public calamities, were, in my opinion, to be directly imputed to the defective and corrupt system of the representation of the people.

Entertaining these views, it was with great satisfaction I heard MR. BROUGHAM, elected so honourably for the county of York, give notice on the first day of the session when I first entered Parliament, of a motion for leave to bring in a bill for Parliamentary Reform, and I immediately intimated to him my resolution warmly to support him.

The great change immediately took place by the resignation of the Duke of Wellington, and the formation of the Liberal Government under Lord Grey.

The Reform Bill introduced by Lord John Russell on the 1st of March 1831, though at first appearing to me rather too sweeping a measure,—upon consideration I entirely approved of as safe and prudent,—and I joined in the general enthusiasm it called forth. Being on the Oxford circuit as a barrister when it was to be read a second time, I came to attend my duty in the House at a considerable professional sacrifice, and I had the satisfaction to find, that I had by so doing, materially furthered the measure,—the second reading being carried by a majority of one only. But I had not an opportunity of explaining my sentiments upon the subject till after the dissolution of Parliament, and the reintroduction of the bill in the new House of Commons.

In the third night's debate on the second reading of the bill, Mr. Frankland Lewis addressed the House,—admitting the necessity for some reform, but severely censuring the bill—yet intimating an intention to vote for the second reading.

When he sat down, I presented myself, and was called to by the Speaker.

## SIR JOHN CAMPBELL.

Mr. SPEAKER, every one must admire the candour and sincerity of the honourable Member who has just sat down, and every one must honour the objections, difficulties, and doubts which perplex his wavering mind. I rejoice to think that after all his animadversions on the provisions of the bill, he is to vote for the second reading—which I trust will be carried almost unanimously. The necessity for some reform of the representation is now conceded, and hardly any one ventures to oppose the principle of the measure. We hear no longer of the absolute and felicitous perfection of the present system. We hear no longer of the peril to the constitution in the smallest alteration of it—in the disfranchising of a single rotten borough, or in granting the elective franchise to any one great unrepresented community. The sharp end of the wedge has lost its horrors. The policy now is to profess a desire for some reform, but to object to this plan of reform—without suggesting any other, and to call for delay. The honourable Member for Radnor says the time will come, and complains of precipitation. Has not the subject been discussed in innumerable publications during the last fifty years, as well as at innumerable public meetings? Has it not been debated within these walls and in the other House of Parliament by all the illustrious statesmen who have flourished during that period? This specific measure was brought forward by the Government in the last Parliament, and canvassed many successive nights. It has since been submitted to the people, and sanctioned by their enthusiastic approbation. The fulness of time has arrived. Farther delay ought not to be asked, and will not be endured.

For my own part, the more I have examined the measure, its wisdom appears to me the more striking, and any objections, difficulties, or doubts which rested on my mind have been cleared away. I can assure the House that I proceeded to the consideration of the

subject with the most profound reverence for the constitution of my country. I believe, and I hesitate not to affirm that there has been a greater share of freedom, prosperity, and happiness enjoyed by the English nation under the English constitution, than ever fell to the lot of any other nation in the world. My conviction is, that to preserve internal tranquility ; to command the respect of foreign states ; to secure enlightened legislation, and an upright administration of the laws ; to give full sway to public opinion without the danger of convulsion—there never was a constitution so well devised as an hereditary monarchy, with an hereditary peerage, and an elective assembly truly returned by the voice of the people. To renovate and preserve this constitution I support the present bill.

(If it were introduced merely to remove anomalies, or to gain some experimental advantages, or to illustrate some political theory, I should condemn it.) I am for the constitution under which our fathers have lived, and which in practice has been found adapted to our feelings, our habits, and our wants. ( Were the Bill to make a new constitution, no arguments in its favour, however plausible, would weigh with me.) I allow, that constitutions cannot be made ;—they must grow—and grow gradually, according to the character and circumstances of the people who are to live under them. I entirely concur in the sentiments of Mr. Fox: that “If by some interposition of divine providence, all the wise men who ever lived in the world were assembled together, they could not make even a tolerable constitution”—that is, a constitution adapted to the people to be governed. Any other must vanish like a passing cloud. A noble Lord (Lord Porchester) who spoke in this debate with so much ability—in describing the failure of the imitations of the English constitution, introduced into Corsica and Portugal, seemed to ascribe this failure to the want of rotten boroughs ; he said the theory, not the practice of our constitution had been adopted, and he rather intimated that with a due proportion of Gattons and Old Sarums it might have been transplanted, and would have been still flourishing in those countries. I must beg leave to differ from the noble Lord, and to doubt whether the English constitution, in its

ideal purity or degenerate practice, could long endure in a country where no legislative power had been before entrusted to the aristocracy, and representative assemblies were unknown. Violent changes are not to be attempted,—least of all in a country like this, where there is so much to be put in hazard. You must regard not only the supposed grievance you mean to redress, but the inconvenience which may arise from the remedy you propose to adopt. In countries, which in the main have been well governed, the rule of wisdom seems to be—introduce only such changes as are necessary to remove practical grievances, and to adapt your institutions to the altered circumstances of the times. The Dutch provinces acted on this rule when they threw off the Spanish yoke,—and so did our American colonies when they achieved their independence. Such was the rule of Lord Somers and the authors of the Revolution of 1688. It was necessary to exclude Roman Catholics from the Throne, and to correct the abuses of prerogative. The dynasty was changed no farther than was necessary to exclude Roman Catholics from the Throne ; the just limits of the prerogative were determined by the bill of rights,—and in all other respects the constitution and laws remained the same under William and his successors.

An argument much relied upon by our opponents has been deduced from the fact that no change was then made in our representative system. No complaint had then been made, that the House of Commons did not truly represent the people ; the grievance which for the time united all parties, was the tyranny of the Sovereign in attempting violently to subvert the religion and laws of the country.

But it is a great error to suppose that the representation of the people in the end of the 17th century was in the same deplorable state as in the year 1830, on the accession of his present Majesty. The number of close boroughs was by no means so considerable then as now ; and, above all, large towns without representatives, and large classes in the community without the elective franchise had not then presented the spectacle of a great nation that had outgrown its institutions. Take the metropolis as an example of



the change. The metropolis then consisted of the City of London and the City of Westminster on the one bank of the Thames, and the borough of Southwark on the other, all returning members to Parliament. If you will now look to the regions of the Tower Hamlets, Finsbury, Marylebone, and Lambeth, you will find an unrepresented population more numerous, and possessing more wealth and intelligence than all the inhabitants of our metropolis in the reign of William 3rd, or than all the inhabitants of any other capital in Europe at the present day. Still more,—at the era of the Revolution the House of Commons fully enjoyed the confidence of the country, and there was no danger of its acts being condemned as the result of oligarchical influence. If the same evils which we now experience had existed in the time of Lord Somers, he would have applied a similar remedy.

What are these evils? That a majority of the Members of this House are either the nominees of borough proprietors, or are returned to it by means of the grossest corruption:—that many large towns have sprung up of late years which are entirely without representatives:—that there are numerous classes amongst us possessed of wealth and intelligence, from whom the elective franchise is improperly withheld,—and that in consequence there exist a general discontent, disgust, suspicion, contempt and hatred towards the House of Commons, which may lead to revolution if not removed by timely reform. These are the evils which the bill professes to remove, and I contend it does not go one iota beyond what is necessary for the attainment of its object. If it had destroyed the distinction between county and borough representation,—divided the kingdom anew into parallelograms,—and enacted that a certain number of representatives should be elected by a certain number of constituents according to an uniform arithmetical rule (as some contend it should have done), it would have been an experiment wantonly departing from the basis of the constitution:—but doing only what is necessary to destroy nomination and corruption, and to give the elective franchise to those who will exercise it for the public good, and to

restore the legislature to the confidence and affection of the people,—it leaves entire all that we are in the habit of respecting,—it will preserve and perpetuate the form of Government of which we all profess to be proud.

The Bill naturally divides itself into two parts, that which disfranchises and that which enfranchises. The disfranchising part is that which caused the greatest tempest of opposition, and is that which is most clearly defensible.

But high ground is taken, and we are told that the existing rights of boroughs to return Members to the House of Commons are sacred, and cannot be touched without proof of delinquency. I insist that whether the elective franchise is to be considered property or trust, the legislature has equally the right to modify it or to take it away. If it be property, compensation is to be made. But on this condition, the owner of the abrogated franchise is no more aggrieved than the compensated owner of land, which is taken for a public improvement. However, I utterly deny that the elective franchise is property admitting of a pecuniary estimate. It is a trust—a sacred trust, conferred without a view to individual profit, and to be resumed for the public good. If it could be shown that the small knots of electors in the boroughs in Schedule A, are duly in possession of the elective franchise as the Irish 40s. freeholders were, when 200,000 of them were destroyed at one fell swoop, we should have a moral right to deprive them of it—without proof of delinquency and without compensation. But I maintain that these electors now exercise the franchise by usurpation and abuse.

The boroughs to be disfranchised are of two classes, such as having been once considerable, are now in decay, and (a much more numerous class) such as when they first sent representatives were inconsiderable villages. The first class can have no absolute right to retain the enjoyment of the elective franchise. If a single summons to send Members to Parliament amounted to a perpetual grant, it must have been subject to the condition that there should continue a town, that there should be persons to be repre-

sented. The privilege was not conferred on the site of the town, if it should become the haunt of deer, instead of resounding with the busy hum of men. The condition failing, the grant is exhausted.

With respect to the other class of boroughs which first were privileged to send Members in the time of the Tudors,—the most arbitrary reigns in English history,—their franchise was an abuse in its origin. The crown had no prerogative to enable the owner of a village and his heirs and assigns, for ever, to send Members to the Commons House of Parliament. The creation of such boroughs ought never to have been recognised. No length of time could give validity to their claim; and their disfranchisement may be considered a declaration of original nullity.

The very form of the writ to the Sheriff shews the constitutional law upon this subject; he is ordered to return two knights for the county, two citizens for every city, and two burgesses for every borough within his bailiwick. All cities and boroughs were to be represented, but representatives were not to be sent by green maunds or mouldering walls.

There is a third class of close boroughs which have the particular sympathy of my honourable and learned Friend, the Member for Boroughbridge (Sir C. Wetherell),—such as Bath,—with an immense population, and twenty-five electors. He represents the throwing open the elective franchise in such towns to the mass of the respectable householders, robbery of the freemen. I call it a putting down of usurpation, and a restoration of chartered rights. As a lawyer, I affirm, without the fear of contradiction, that when boroughs were first summoned to send Members to Parliament, the terms of “burgess” and “householder,” were synonymous, and all the free inhabitants of the town sworn at the leet, had a right to vote. It is in times comparatively modern, that the inhabitants at large have been disfranchised. Are the burgesses or freemen who now exclusively enjoy the franchise the same sort of burgesses on whom it was conferred in former times? No! for they may be men not only wholly ignorant and illiterate, but without property—

without a dwelling—without character—without the means of subsistence, except the bribe which they demand ;—whilst the substantial householders, the men of education, property, and independence, may be entirely excluded. The opening of the elective franchise in such places, therefore, instead of being, in the language of my learned Friend, a revolutionary movement, is a redintegration of the constitution of old England.

With respect to the various fantastical rights of voting in different boroughs, which for their variety have been so much praised, I will again, as a lawyer, venture to affirm, that they can be ascribed to no legal origin, and that they have obtained a sanction only from corrupt decisions of this House, before the Grenville act. A person who supported the minister of the day, had a small class of dependants in a particular borough ; they elected the ministerial candidate ; and upon an election petition, in these exclusively was the right of election, by a ministerial majority, decided to be—contrary, to all law, conscience, and decency. So the seat was disposed of, till a dissolution on a change of ministry,—when the right of voting was transferred to some other class, perhaps as little entitled to it. Then came the statute, 2 Geo. 2nd, c. 24, which enacted, that the last decision should be final, and perpetuated all the abuses of the preceding hundred years.

My learned Friend re-echoes the cry of *corporation* robbery ! It is a curious fact that Schedule A being examined, will be found to consist chiefly of petty villages, which never reached the dignity of being incorporated. In truth, the incorporation of a place, and the elective franchise, have no necessary connection. There are municipal corporations without representatives, as well as unincorporated towns returning Members. It is absurd to suppose, that by communicating the elective franchise to the respectable inhabitants of a town, the legitimate objects for which it was incorporated can in any degree be defeated.

The *right* to abrogate or extend the franchise in all places being established, the matter resolves itself into a question of expediency. If the rotten boroughs are useful to the Crown, the Peers, and the

people,—by all means let them be preserved. But if they impede the exercise of the just prerogatives of the Crown—if they are hurtful to the character and usefulness of the peerage—if they infringe the rights, and corrupt the morals of the people—if they bring a scandal upon the legislature, and destroy all respect for its proceedings,—let them be instantly abolished.

That the march of government is facilitated by the power now existing of introducing the ministers of the Crown into this House, and of selecting the fittest person for office, without considering whether he can procure or retain a seat, it is impossible to deny. But has not this convenience been often overbalanced, by the thralldom into which the Crown has been reduced, from a combination of boroughmongers? If the necessity should arise, a Member of the House of Commons who held office under the Crown when elected, may be permitted to accept another office without vacating his seat;—or the privilege might be given to the holders of certain offices under the Crown to sit and speak in the House, by virtue of their offices. Even if the power of voting were added, I should think the arrangement not more unconstitutional, and much less objectionable than the sale, purchase, and barter of seats under the auspices of the Secretary to the Treasury.

There has been a new doctrine recently brought forward—not to be found in Blackstone or De Lolme—forming no part of that constitution praised by Montesquieu and other foreign writers of great name, who have pointed out England as a model to the world—unlike the *beau ideal* of a perfect constitution imagined by Cicero and ancient statesmen and philosophers,—in which the three forms of government were to balance each other;—that the supreme power is centered in this one House of Parliament;—that it represents the Crown and the peerage as well as the people;—that here the three estates of the realm are to carry on a struggle for superiority,—and that the Peers are to maintain their weight and influence by retaining a mercenary band of political gladiators or condottieri, who are here to fight their battles. Such a doctrine tends to bring the Peers into contempt, and if it were to be acted upon, would be

fatal to their order. In times like these, men must depend upon their own talents, their own energies, and the respect which they earn by their own exertions. I honour the hereditary peerage of England, and wish to see the members of it preserve all their constitutional power and privileges. To temper popular precipitation,—to check the power of the Crown, you must have a second chamber in your legislature. This chamber is to serve as a rallying point for public opinion, but must not be elected by the people.

Unlike the Roman Senate, to which the highest patrician birth did not give admission without service to the state, the House of Lords is almost entirely filled by right of birth; and enterprise, energy, and industry are hardly to be expected from those who without effort inherit wealth and station. Still greater evils may be apprehended from a coordinate power of legislating being given to an assembly composed of one class—their revenue arising from land alone—entirely independent of the Crown and of the people.

But with all its imperfections and faults, I know not how, by any predetermined right or any power of selection, you could frame a second chamber more likely to enjoy public respect, or to act better for the public welfare. There are historical recollections from Magna Charta downwards to attach us to the Peers—they are still regarded with kindness, notwithstanding their resistance for the last half century to all measures of improvement, and they can never be endangered except by their own inactivity and obstinacy.

This bill having passed, and their champions being lost from this House, they will be thrown upon their own resources; in their own House they will combat in their proper persons; they may see the necessity for supporting their weight in the country by wise measures, and they may rise in character and influence.

We are told of the dangers of a difference between the two Houses, were the theory of the constitution to be acted upon, and they were to be independent of each other—but patriotic discussion will lead to unanimity or prudent compromise; and if there should occasionally be some collision between them, it is only what

has before happened in the best of times, and perhaps may have a salutary tendency.

A more plausible argument is, that young men of talent are introduced to the public service through the close boroughs. I allow, that the distinction gained by this class of members has not been merely accidental, and such as might be expected from a similar number elected by popular constituencies. The lustre shed upon the House of Commons by their brilliant success, must be admitted to be directly an effect of nomination, and it is almost impossible to avoid being dazzled by the splendour of the names of those who by this "portal" have been introduced into public life. But steadily looking at nomination—observing the venality on which it is necessarily founded—regard being had to all its tendencies and consequences,—I am fully convinced, that it has been the source of infinite evil to this country. How does the patron obtain the command of the borough? Sometimes from the legitimate influence of property and personal kindness,—but much oftener by illegal traffic, systematic corruption, and the suspended power of oppression. The borough being his property, he may sell the seat, as is often done, to the highest bidder, for a gross sum during the Parliament, or by the Session, for an annual payment, with a power on notice to determine the lease. But I suppose him to bestow the seat gratuitously upon some youth selected for talent and acquirement. If the patron be a man of liberality, and there be a complete accordance of sentiment between him and his nominee, all goes well. But have we not heard of tyrannical and capricious patrons? Have they not sent mandates which their nominees were unwillingly bound to obey? Did we not in the last Session hear a Member of distinguished eloquence declare in his place, that he must vote against this very bill, but that he hoped he should be found in a minority? What can be the effect of such declarations, and of the existence of the system which occasions them, but to degrade this House in public estimation? No doubt some promising young men thus brought into Parliament have risen to honourable distinction, who might otherwise have remained in obscurity; but are there not

others who might in due time have entered on a creditable career as the independent representatives of pure constituencies—who under the subjugation of borough patrons have sunk into apathy, or who, having voted systematically against their consciences, have finally betrayed their country?

“By Jove’s decree, whatever fatal day  
Makes man a slave, takes half his worth away.”

An honourable and gallant Member last night insisted upon the extreme injustice which the proposed disfranchisement would work to the colonies. Translated into plain English this means that seats ought to remain saleable; and followed out—would lead back to the old advertisements “Wanted”—or “To be disposed of—a seat in a certain assembly &c.” The rich Nabob arriving from India—high in his own estimation—but his merits unknown in the western hemisphere—burning to serve his country as well as to enter fashionable life—when he buys a house in St. James’s Square ought he to be permitted to buy a seat in the House of Commons either as an entirety from the owner of the borough, or in parts by bribing the voters? Time was when one province of India was represented, and a Rajah had seven or eight Members in this House. Are these the glorious days which the gallant General wishes to restore and perpetuate? If the Colonies are to be represented in this House let it be done openly and directly, and let us be able to refer in the next Parliament to the honourable Member for Bengal, the honourable Member for Jamaica, or the honourable Member for Botany Bay.

But look to the general corruption which this system of nomination necessarily induces. If a patriotic Duke of Devonshire may purchase the property in a borough to bring in deserving men of talent free from all expense, a jobbing attorney may purchase similar property and put up his seats to auction. Nor does it rest there. The sanction given to a violation of the law by laudable nominations introduces corruption and venality among a great part of the constituency of the country;—and to give or receive bribes, instead of



being infamous, is only called the fashion of the day. If the sole owner of a borough may sell a seat for 5,000*l.*,—where there are fifty electors, each considers himself owner of a fiftieth part of the borough, and thinks he has a good right to 100*l.* for his share of the seat. So if there are five hundred electors, each claims 10*l.*, and if all the electors, confining themselves to head-money, come in *pari passu* when the “breakfast is given” or “the cheese-cakes are distributed” or “the mouse runs” the borough is thought very virtuous. The next step is, that the voter, finding the principle of sale and purchase established, naturally concludes that he may turn his vote to the best account, and dispose of it to the person who will give him the best price before he comes to the poll. What mischief thus arises? A large proportion of the community learn to violate the law. These unhallowed gains are of no benefit to the bribed or their families, but bring on habits of idleness, improvidence and intemperance. The bribery oath being treated as an empty form, the sanctity of an oath on other occasions is disregarded, subornation of perjury is systematised, and the foundations of morality and religion are undermined.

“It is not, nor it cannot come to good.”

I must likewise point out the disgrace brought on the Peerage itself by the nomination system, supposed to be so much for its advantage. If a man is detected in the preliminary traffic, he is liable to be prosecuted and punished. In my own time I have known individuals sent to Newgate for a conspiracy corruptly to procure the return of Members of Parliament—that is to carry on the nomination system. But other individuals, more fortunate, having escaped detection, and acquired the means of bringing talent into this House on the recommendation of the Minister, have been enobled for the same conduct.

“*Ille crucem sceleris pretium tulit ; hic diadema.*”

The worst consequences must necessarily flow from the present conflict between laws and manners. If the sale of seats and votes is in practice to be tolerated, it ought, like the sale of game, to be

legalized. No wonder the poor smuggler should not pay much regard to the revenue law, when he sees positive laws for enforcing prior moral obligations openly violated by the Members for the borough, and perhaps by the Lord-lieutenant of the county.

I am afraid that Members returned to Parliament by such a perversion of all that is lawful and decent, cannot be expected to be as intelligent and as virtuous as if truly representing public opinion, and as much devoted to the public interest as if they were freely elected by the voice of the people. But allowing this to be so, it is impossible that they should enjoy public confidence, or usefully exercise their functions as legislators. The scandal necessarily occasioned by the present system alienates from Parliament the affections of the people. Laws, however wise, will not be cheerfully obeyed, if made by legislators so constituted.

There is in every nation a tendency to discontent and disaffection. By the constitution of human affairs under our Divine Ruler, there is much misery to be endured in society,—and the notion of the vulgar is, that this is all caused and may all be cured by human laws. It is, therefore, of the last importance, that there should be a decency and propriety in the manner in which an assembly having legislative power is constituted, as well as wisdom in its acts. Is it possible that this House can be regarded with respect, if a majority of the Members be returned by undue means? Suppose the Judges in this country were to buy their offices, and were even still to administer the law with the same purity as at present, would they be looked up to with the same reverence, and would there be the same submission to their judgments? Sir, this House has lost the confidence of the people, and the only mode of regaining it is by taking care that the people shall elect the Members. I say that this great object will be accomplished by the present bill. When nomination is at an end, the laws against corruption may be enforced with general applause, and the freely-elected representatives enjoying confidence and affection, inevitable evils will be submitted to as arising from the dispensations of providence, instead of being represented as the effect of mis-government.

With respect to the extinction of rights of voting in the boroughs to be preserved it is to be observed, that as the bill is framed, this will be without prejudice to individuals now in the possession of the franchise, and it does not follow the confiscating precedent of 1829, when 200,000 individuals, lawfully in possession of the franchise, were instantly deprived of it, without the imputation, much less the proof of any crime.

There is one class of voters, whose continuance even for existing lives I regard with some apprehension:—I mean the freemen;—and to save the new system from the danger of contamination, I could have wished that they might instantly have ceased to enjoy the right of voting as freemen, whether non-resident or resident within the borough.

I have now to offer a few observations on the proposed extension of the elective franchise. As far forth as granting representatives to the great unrepresented towns no one ventures now to object. We are changed indeed from the time not very remote, when Mr. Huskisson and the enlightened part of the Duke of Wellington's cabinet, who ventured to think that the present system was not absolute perfection, were dismissed, because they voted for giving representatives to Birmingham, instead of continuing the franchise to the convicted borough of East Retford. I consider it fortunate that that wretched concession was then resisted. Followed with a grant to a few other great towns, real reforms might have been deferred for many years,—to a period when after such long delays an attempt to renovate and restore the constitution, would have been vain. In the course pursued upon this subject by the Hero of a hundred battles,—by the conqueror of Napoleon,—what an instance have we of the infirmity of the human mind. As a military commander the Duke of Wellington may be regarded as the most consummate that ever led an army into the field, and from Assye to Waterloo he never once miscalculated his position, or committed a fault. The same man as Prime Minister at the head of the civil Government of the country, not only in his own judgment most conscientiously believed the rotten boroughs and unrepresented

great towns parts of a perfect system of representation, but down to November last was fully convinced, that such was the opinion of the great mass of the population of this country,—who in reality were ready to rise as one man in favour of Reform,—and then congratulated himself upon strengthening his government by that memorable declaration, which occasioned its overthrow.

But while Manchester, Birmingham and Leeds, are now to have representatives with general consent, a strong objection is made to the new metropolitan boroughs. Why should these immense districts, so populous, so wealthy, so abounding in well educated and independent citizens, contributing so largely to the necessities of the state, having such an interest in its welfare, remain unrepresented, because they happen to adjoin the more antient parts of this metropolis, which they greatly outweigh in importance? Then why should it be supposed that the members returned by these districts will be low illiterate demagogues? They will be returned by a constituency of higher qualification than Westminster has hitherto been; for Westminster it must be remembered is a scot and lot borough, every one who boils a pot in it and pays rates having a vote; and history tells us that Mr. Fox and many others, distinguished for their family, talents and services, have been returned for that place. Demagogues of all sorts have come forward as candidates, but when did any of them succeed? What reason have we to suppose that Marylebone and Finsbury will not send to this house members equally eminent and equally respectable?

The grant of the additional members to counties has been animadverted upon only by my honorable and learned Friend the Member for Whitehaven (Sir James Scarlett) who is afraid that this, coupled with the disfranchisement of the boroughs usually represented by commercial men, may give too great a preponderance to the landed interest. I should deprecate with him being under the sway of the Squires; for although I do not entertain his fears that they may abolish the national debt, I do not think they are particularly distinguished for enlightenment or disinterestedness, and a regard for high rents might make them see very formidable

dangers in a free commerce in corn. But the county representation has hitherto been considered the most healthy part of our representative system; the great reformers who have preceded Earl Grey, have thought that by an increase of county members fresh blood would be infused into the constitution;—it must be remembered that while a freehold of 40s. a-year gives one vote, a freehold of 20,000l. a year does no more, and that small freeholds, which form a considerable proportion of the county votes, are held by men in trade, who will look to the general interest of the community.

So much for the places to which the right is conceded. The classes to whom the elective franchise is given are copyholders, leaseholders, and 10l. householders. Copyholders were not allowed to vote, because when the franchise was settled they were mere tenants-at-will, and must have voted according to “the will of the lord.” But the copyholder has now as secure a tenure, and is in all respects as independent as the freeholder, and is entitled to equal political rights. It is about a century since Blackstone, no theorist or innovator, recommended the correction of this injustice.

With regard to leaseholders care must be taken to preserve the principle hitherto held sacred, that in counties the elective franchise shall be confined to those who have a permanent profitable interest in the land. Tenants-at-will could not be admitted without a violation of this principle. But there are technical legal distinctions between freehold and leasehold, which cannot properly be made the foundation of the elective franchise. If a man holds for one thousand years, paying no rent, an estate worth 1,000l. a-year, he is only a leaseholder, and has no vote;—while a vote may be claimed as a freeholder by the grantee of a rent charge of 40s. a year for the life a man of seventy, who has had a stroke of the palsy. Wherever you may hail an independent voter having a permanent independent interest in the soil, let him vote for the county members—by whatever jargon lawyers may designate his tenure.

But the great stand is against the 10l. qualification in towns. This is assailed by some as too high, by others, as too low. I own I deem it a happy medium. To universal suffrage, I have ever been,

and ever shall be opposed. The abstract right of every individual to vote for Members of Parliament, cannot be the foundation of the elective franchise,—or even what is understood by universal suffrage would be unjust ; for, I believe, it cuts off the whole of the female sex, maids, wives, and widows,—and males who are under 21, or who have been convicted of felony, or who are receiving parish relief. By the confession of the universalists, therefore, expediency is the principle, and you must look out for a test of fitness. That test must be capable of being easily applied, and must present the least danger of admitting those who ought to be excluded, and of excluding those who ought to be admitted.

It is said, all householders, without regard to rent or rates, ought to be voters. This is very plausible ; but I must have your definition of a house, and you will find it difficult, in this way, not to have for a voter the wandering gipsy who sleeps under a tent, and boils his kettle by the side of it. This would be attended with many of the evils of universal suffrage, while it would render more invidious the exclusion of lodgers and inmates. The head of a family, who does not occupy a 10*l.* house and pay rates, can hardly be above dependence. Lowering the franchise still further, would, no doubt, let in some individuals who might safely be intrusted with the franchise ; but, upon the whole, I fear it would add to the means of corruption, and to the weight of aristocratical influence. The man who is pinched by poverty, is under greater temptation to receive a bribe, to yield to a threat, or to be cajoled by a promise of protection. When lowering the franchise is considered, let us ever keep in view the working of the freeman's qualification depending upon birth alone, which has introduced some of the worst evils of the present electoral system.

Strong objection has been made to the rate paying clauses ; but paying scot and lot, as well as the occupation of a house, was, at common law, a necessary part of the qualification to vote for boroughs, and was, no doubt, required as a test of the class of substantial householders, to whom the elective franchise might be safely intrusted. The household right, though so guarded, has this

advantage, that it is open to all, and that he who has it not this year, may hope to have it the next. It is not like the freeman's qualification, which can only be claimed by birth or servitude, nor a burgage tenement which the lord of the borough takes care to part with only to a dependent on the day of election.

Shall we adopt the French qualification—the payment of a certain sum in direct taxes to the state? But this may include the spendthrift who has squandered his whole substance, and is wandering about without house or home. What is worse, it excludes all who are not subject to direct taxation, or who may, from prudent economy or taste, though possessed of considerable property, choose to avoid the expenditure necessary to raise their direct taxation to the given amount.

Do you propose property to a given amount as the qualification? But the wealth of each individual could only be ascertained by an inquisitorial scrutiny into his private affairs; and, in the census to be held, is no value to be put upon the cunning of the artist, or the skill of the physician, or the learning of the lawyer?—although it may fairly be argued, that the man qualified to practise the liberal professions, ought to be permitted to vote without regard to his actual gains, and that he has in him the potentiality of riches.

It is loudly objected, that as before there was an almost infinite variety of qualifications in boroughs, there is now to be only one. Many fantastical and preposterous qualifications will in time disappear, but it is an entire mistake to suppose, that the electors will be all of one class; for the qualification applies to all classes, and all will be included in it. Every head of a family, be he mechanic, or tradesman, or professional man, or man of independent fortune, living in a town, is a householder. It may likewise be observed, that the 10*l.* qualification, though uniform in nominal amount, will indicate electors different in wealth and station in rural boroughs, from those in manufacturing towns; so that by an apparent uniformity, that practical diversity will be attained, which some honourable gentlemen so highly prize.

But the objection is urged, that this qualification is, in all cases,

too low. It is easy to dwell on the characteristic and besetting imperfections and sins of 10*l.* householders, or any other class in society. I might equally say, that men of overgrown fortune should not be trusted with the elective franchise, because they are often idle, indolent, and profligate—caring for nothing, except the amusements of Melton Mowbray, Newmarket, Crockford's, and Almack's.

*“Rarus enim ferme sensus communis in illâ  
Fortunâ.”*

But it would be absurd to disfranchise all men above 10,000*l.* a-year, because some of that fortune may be liable to such imputations. So the humble attorney and little shopkeeper, of whom so much was said in the last parliament, may be under certain illaudable propensities, but if for that reason the franchise is to be withheld from them, how are we to obtain an impeccable constituency?

A preponderance will certainly be given to the middling orders which they never before enjoyed: but, in the middling orders, I believe to reside the greatest portion of intelligence and independence. For a long while, the House of Commons has been returned,—and, therefore, the supreme power has been enjoyed—by a few great men, who have contrived to get a majority of seats into their grasp. The Government, in truth, has been an oligarchy—the monarch being reduced to a state of subjection, and the people cheated of their privileges. Public opinion did, at last, make some impression upon both Houses of Parliament, but they have lamentably lagged behind in the march of improvement. Now, the representatives must watch the wishes of those who are become their patrons, and who are likely to be their surest guides in the just and useful discharge of their duties as legislators.

Such are some of the evils of the present system by which Members are returned to this House, and such are some of the benefits which may be expected from the noble measure now proposed by the Ministers of the Crown. Are the Gentlemen opposite resolved, that as far as lies in their power, there shall be no change? Is



Scotland, my native country, to remain for ever in its present degraded state, lest England should learn, that long established abuses are not necessarily to be perpetual? The right honourable Baronet, the Member for Tamworth, has admitted, that in Scotland, election is a mockery, and that the practice there can only be defended as part of a general system which, on the whole, works well, and ought to be preserved. Can it be expected, that such reasoning will be submitted to, and that we may again see a county election consummated by the operations of one individual in the triple capacity of candidate, elector, and sheriff? The tide of the ocean cannot be resisted; human power cannot stop the planets in their course.

But it is said, let us have a parliamentary reform by punishing delinquent boroughs, and transferring their franchise to large unrepresented towns. This is the only specific plan which has been propounded in opposition to the bill. But I must first use the freedom to ask the question why should these boroughs be considered delinquent by honourable Gentlemen opposite? They sell themselves; they furnish representatives for the colonial and commercial interests; they give the opportunity for a person suddenly arriving in this country with money in his pocket, after a long residence in India, to become a legislator; in short they are the useful, necessary, and indispensable though shameful parts of the constitution. If that plan were effectually pursued, if all delinquent boroughs were eradicated, and the example worked repentance and reformation, there could no longer be bribery or bargaining for seats, and according to true conservative notions, property would lose its due weight, the constitution would be destroyed, we should soon be in the situation of revolutionary France, and the *movement* would proceed till the frame of society was dissolved. But can there be a greater delusion—a greater piece of hypocrisy than selecting one borough for punishment, when no conscientious man can lay his hand on his heart and say, that he does not believe the majority of the Members of this House have obtained their seats by such acts of delinquency as are now to be punished with

disfranchisement? Again, how are you to discover, and how are you to prove the delinquency? In towns with a numerous constituency, receiving 5*l.* or 10*l.* a head, the necessary evidence might to be obtained; but how would you proceed in the case of such boroughs as Gatton and Old Sarum, where there is a single elector or proprietor? He receives from his purchaser five Bank of England notes for 1,000*l.* each, and the transaction is the subject only of suspicion or surmise. This system of reform is based upon the principle that secrecy is virtue, and detection crime.

But it has been said, that supposing the whole ministerial plan to be good as far as we can prospectively judge, it ought to be adopted step by step, that we may see by gradual experience how it works as we advance;—and I must own, that when I heard my noble Friend on the memorable first of March, though approving of all he proposed, I was somewhat startled, and “my breath was taken away” by a mixture of alarm with my admiration. But I have as little scruple in declaring that upon consideration, I think the Government were entirely right in now bringing forward all that they intend to propose with a view to parliamentary reform as one great measure. The boldest course is often the safest and the best. Great organic changes in religious or political institutions can only be made when there is a considerable ferment in the public mind, which cannot be of long endurance. When that has passed away, indolence, apathy, prejudice, and a regard to private interests present an insuperable bar to farther improvement. The materials of which the fabric of government is composed, must be in a state of fusion to run into new shapes. The metal which at the welding heat would have taken any impression, when cold resists every blow. But another danger would arise if successive changes could be carried at intervals, that advancing by degrees without a defined limit, it is impossible to say where you will stop, extravagant expectations may be excited, and an appetite for continued change may be generated;—whereas it must be admitted, that stability is necessary to acquire respect and reverence for political institutions. I cannot predicate of any measure that it is final and that it is to receive no

amendment—but I do confidently anticipate that this measure now brought forward frankly and openly as, in the opinion of its authors, an effectual remedy for existing grievances, will have a fair trial, and that no farther change will be demanded till experience shall have shown original imperfections in the system, or a change of external circumstances may require a corresponding change in the law.

In granting parliamentary reform we cannot follow a better precedent than that set by the right honourable Baronet in the Catholic Relief Bill. Concession was not made to the Catholics bit by bit. All penalties, all disqualifications for religious opinion were at once done away with; both Houses of Parliament were thrown open to Roman Catholics, without attempting to limit the subjects on which they are to legislate; the veto on the appointment of Bishops was abandoned, and no securities required except the attachment and confidence which kind treatment will create. One speck of ancient intolerance remained upon the bill, which I am persuaded the right honourable Gentleman, having suddenly assumed the character of Catholic Emancipator, would himself have been desirous to wipe off, and only submitted to, lest he should endanger the measure itself. The effect of that was for a time to exclude from the House the individual by whose exertions the shackles of the Catholics had been struck off, and to prolong agitation in a country ready to sink into grateful repose. Fortunately that learned and honourable Gentleman is now within the pale of the constitution, and I hope he will always remain so, for his own honour, and for the benefit of the country. The only risk to the well working of the measure of Roman Catholic Relief, at last conceived and framed in a great spirit, arises from its being so long deferred;—and we must see that the measure of Parliamentary Reform is not exposed to a similar peril.

But, says an honourable Gentleman opposite, the times are unfavourable for such a change as this—revolutions are travelling over the world—wait for a season of tranquillity. On the contrary, if you duly profit by what is passing around you, such changes are

immediately required in order to guard against similar revolutions. Fortified and prepared, the storm may rage over our heads, and we remain secure. The probability of foreign war, likewise urged as an argument for delay, is an additional argument for vigour and dispatch. Do you believe, that in their present temper, the people, disappointed of all their hopes of reform and consequent improvement, would be willing to bear the burdens, and to make the exertions which would be required if we have again to struggle against a confederacy of the great powers of Europe.

That there will be a cry for further concession among deluded and ill-disposed persons I doubt not, but that cry will be easily resisted after the grant of all that is reasonable and practicable ;—and universal suffrage with annual parliaments will be considered a chimera. The whole property and intelligence of the country being now represented in the House of Commons, instead of that body consenting to a further and dangerous extension of the suffrage, I should think there will be a greater danger of its refusing hereafter any alteration in its constitution—encroaching on the other authorities of the State,—and seeking to engross all power into its own hands. But this danger, if it arise, may be met by an appeal through the prerogative of the Crown to the judgment of an enlightened constituency.

Agree then to the second reading of the bill—and this will be without any impeachment of the wisdom of our ancestors. We are restoring, not innovating. At any rate recollect, that we are sitting here as legislators, not antiquaries ; and that instead of paying compliments to our ancestors, we are to consult the interests of our posterity. If necessary, why should we not alter the ancient representative system, as well as abolish military tenures, or the star chamber, or fines and recoveries, or suffer witnesses to be examined on oath for the Defendant on a criminal charge, or allow that in cases of felony, his counsel may vindicate his innocence by an address to the jury.

I am not much of an enthusiast, but I cannot help being convinced, that this measure, if now passed, will not only give content-

ment to the people, but will be a guarantee for good government in future. I should hope, that the political party from whom the measure originates, who have been striving for it during the last fifty years, will remain in power to carry it into execution, and to preside over the destinies of the country, with that steady regard for civil and religious liberty, which having long excluded them from office, has under this auspicious reign obtained for them the favour of the sovereign. But if from the fickleness of the popular gale, or from loss of Court favour, or from their own misconduct, they are driven from the helm, and they are replaced by the leaders of the Tory party, we shall have little to fear from the obnoxious doctrines of Toryism, which will no more be professed, and cannot be long acted upon. Pass this bill, and you give such a direct and overpowering impetus to enlightened public opinion, that it will be of much less importance what political appellation is given to the party to which Ministers are said to belong. If the Right Honourable Gentleman should again accept office, and would retain it, although called the Conservative or Tory leader, he must conform to Reform,—he must abjure orange ascendancy in Ireland,—he must never think of reviving the Six Acts in England,—he must without regard to the interests of particular classes, follow the line of commercial policy best adapted to secure plenty and comfort to the great mass of our population.

That there is no danger in such a great untried measure as this, I am very far from asserting. This danger is distant, is problematical, may be averted or remedied. But think of the inevitable and irremediable danger of disregarding the wishes of the people now expressed, after long and calm deliberation, with a unanimity and force unparalleled in our history. I use not the language of intimidation. I am not afraid of any sudden violence if the bill should be rejected; but I do apprehend something worse. A riot may be suppressed; but there will be no cure for the deep-rooted discontents and jealousies which will universally prevail. By degrees the affections of the people will be completely alienated from our monarchical form of government, and they will be prepared for a

desperate movement which will involve all orders of the state in one common ruin. On the other hand, if the bill is now passed, we shall regain and continue to enjoy the confidence and affections of the public, and our ancient institutions being adapted to the actual state of society, we may look forward to a long career of harmony and happiness.

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[NOTE—It is well known that this bill was passed by the Commons and rejected by the Lords—but that in the following Session Parliamentary Reform was carried with the perpetuation of the Freeman and the Chandos clause. Neither the predictions of the enemies or of the friends of the Reform Bill have been verified; but I think, that impartial men will allow its operation has been on the whole highly beneficial. Mr. CROKER, its most eloquent and vigorous opponent, must himself now be amused by his apprehensions of its revolutionary tendency, and his conviction that there could be no stable administration under it. Perhaps he may even repent his vow never to sit in a reformed Parliament.

On the other hand while necessary disappointment awaited the giddy multitude, who expected that it was to raise wages and lessen labour, to make bread cheap and the seasons propitious, it must be admitted, that some of the expectations of its rational supporters have not been fulfilled, although its imperfect working may, to a considerable degree, be imputed to the changes it underwent in perpetuating the franchise of the freemen in boroughs and allowing tenants at will to vote for counties.

By all accounts, the purity of election which was anticipated from the disfranchisement of the rotten boroughs, and the extension of the franchise, has by no means taken place. The equal balance of parties, and the belief that the fate of the Administration depended upon a few seats in the House of Commons, have exposed the new system to a most formidable trial in this respect, through which I am by no means prepared to say it could have creditably

passed, even if the freemen had been disfranchised; but there can be no doubt that a great impetus was given to bribery by perpetuating the franchise to a class of men who, wherever they existed, considered from long habit that they had as good a right to be paid for their votes as for their labour or the wares they might sell, and demanded and received voting money with the same consciousness of rectitude as if it had been a debt due to them recoverable in a court of justice. The needy freeman without a house still insisting on his supposed rights, the newly enfranchised 10*l.* householder is corrupted by his example, and there is even a danger of the contagion spreading among the 40*s.* freeholders in counties, who till lately have been above all suspicion.

There is great difficulty in now suggesting any remedy. Increasing the number of electors I fear would be unavailing; for in a close contest it must equally be an object to secure mercenary votes, and the facility of doing so would be increased by the lowering of the franchise. Ballot in small constituencies would perhaps increase the evil. Whether good might not arise from the combination of these two measures it may become necessary seriously to consider. From direct legislation against bribery, I fear that much is not now to be expected. While the Reform Bill was before Parliament, I was employed under the sanction of Lord Grey's Government by Lord BROUGHAM, who has always taken a lively interest in promoting purity of election, to prepare a bill to check bribery and treating; and it is to be regretted that some such bill did not pass at the same time with the Reform Bill, so that a solemn warning might have been given to the new constituencies, and there might have been an improved chance of regeneration in the old boroughs where venality had before prevailed. I am glad to think that the subject is still under the consideration of Lord BROUGHAM, who I am convinced will do all that can be effected to remedy this great evil.

I think it must likewise be admitted, that through the Chandos clause an undue influence has been given to the landed aristocracy. There is no doubt, that a great re-action has taken place in public

opinion,—that the demands of the ultra radical and chartist parties have alarmed many sensible men, and that the flood tide of Reform having reached its height, the current for a time runs strong in a contrary direction. A numerous return of Conservative Members therefore, at this time, would be no argument that the reformed House of Commons does not represent the sentiments of the people. But the large majority in favour of commercial restrictions, and against a free trade in corn, does shew, that the land has obtained an undue ascendancy.

Here again I know not what is the remedy. Although the granting of the franchise in counties to persons without any permanent interest in the soil, and entirely dependent on the will of another, was quite contrary to the principles of county representation, and was palpably giving a plurality of votes to one man according to property in land, contrary to the principles of the English constitution; it would now be vain to propose that the franchise shall be resumed, and I am aware of no way in which the equipoise can be restored. We can only trust that enlightened public opinion will prevent the representatives returned by the excessive influence of the land from obstinately supporting their own interests real or imaginary, contrary to the general weal.

I must likewise acknowledge, that the facility given to introduce men of talents into the House by the nomination system, has not found a complete substitute. The new boroughs have returned some very distinguished men, but with splendid exceptions I believe it is generally felt, that the representatives of the great manufacturing towns enfranchised by the bill, though all highly respectable and independent, in point of education, information, and eloquence, have hardly equalled the representatives of the boroughs which were disfranchised. But we must console ourselves by considering the scandal which has been wiped away, and the numerous undoubted benefits which have been produced by the passing of the Reform Bill.

No combination of borough-holding peers can now intral the sovereign, and set at defiance the wishes of the people. We ap-



proach that which may be considered the most perfect form of government, where public opinion is to determine who shall be at the head of the government. The Crown, in the appointment of Ministers, is constitutionally guided by the advice of a majority of the House of Commons, representing and expressing public opinion more closely than in former times. A return to the corrupt and arbitrary maxims on which government has been carried on in this country, is now impossible, and it is of much less consequence to the public who is minister or what party is in power. The Ministers of the Crown must profess and act upon the principles of civil and religious liberty, which are cherished by the great body of the people. The progress of improvement may be interrupted and stopped for a time, by the accession to office of those who, in their hearts, may be inclined to bigotry and arbitrary sway; but we shall have no backward course in legislation, and any advantage which has been gained is secure.

In my opinion, the Reform Bill would have worked much better, and would have given a more permanent triumph to liberal principles and practical improvement, if it had been allowed to have a fair trial, without an effort being immediately made by a section of its supporters, to throw discredit upon it, and immediately to attempt farther and dangerous changes. The new system under the Reform Bill made an inauspicious start, by the re-election of Mr. Manners Sutton as Speaker, and the introduction of the Irish Coercion Bill: but the great mischief to the liberal cause, was done by the instant efforts to force vote by ballot, the lowering of the franchise, and annual parliaments. Since the Revolution of 1688, there had not been such national unanimity as was exhibited in favour of the Reform Bill; but many sensible and enlightened men became alarmed, lest the prophecies of "a lower depth," should be fulfilled,—and, to oppose farther change, threw themselves into the conservative ranks. Another ill consequence from these efforts was that they called forth declarations from Lord John Russell and his colleagues, which being misunderstood or misrepresented, gave rise to the cry, that the Whig government had pronounced the doctrine

of *finality*, and that all the provisions of the Reform Bill being binding in *secula seculorum*, no alteration or improvement upon it was ever to be admitted. This cry made the government unpopular with many zealous reformers, and the argument was brought forward, that ultimately to obtain further reform the best course would be to restore the Tories to power.

Then sprung up the Chartists, who considered the ultra-Radicals little better than aristocrats ; who would be contented with nothing short of universal suffrage by way of amending the representative system ; who contended for a re-distribution of property, and many of whom thought that to obtain their objects physical force might be properly resorted to. Such notions led to popular outbreaks in various parts of the country, and it was indispensably necessary for the preservation of the public peace, and the vindication of the dignity of the laws, that numerous prosecutions should be instituted by the Attorney General. These in every instance succeeded, but they afforded a pretence for imputing severity to the Government. The march of an armed mob to storm a town,—an attack on the Queen's troops,—a conspiracy to assassinate magistrates,—deliberate exhortations to use the dagger and the torch—were called “political offences” which ought to be overlooked or immediately pardoned after conviction. Unscrupulous members of the Tory party did not hesitate to join in the charge against the Government, and with a view of obtaining the votes of Chartists at elections, or what was more valuable, the diversion of a Chartist candidate openly coalesced with that party, and representing their leaders who were suffering the sentence of the law as the victims of oppression. All these remote consequences may perhaps be traced to the unreasonable conduct of those supporters of the Reform Bill, who, as soon as it had passed, began to play a game which has brought its opponents into power.

There is one part of the United Kingdom where the Reform Bill has conferred unmixed benefits. The political degradation of Scotland under the old system cannot easily be conceived. A very lively and not overcharged sketch of it may be seen by the masterly

hand of Lord Brougham, in his admirable work "The Characters of Statesmen in the time of George III," where, in his account of Mr. Dundas, he is describing the consternation and perplexity of his countrymen when Pitt and he were in opposition during the administration of Mr. Addington. "Those who are old enough to remember that dark interval may recollect how the public mind in Scotland was subdued with awe, and how men awaited in trembling silence the uncertain event,—as all living things quail during the solemn pause that precedes an earthquake. It was in truth a crisis to try men's souls. For a while all was uncertainty and consternation; all were seen fluttering about like birds in an eclipse, or a thunder storm; no man could tell whom he might trust; nay, worse still, no man could tell of whom he might ask any thing. It was hard to say, not who were in office, but who were likely to remain in office. All true Scots were in dismay and distraction." The noble author expresses some doubt as to the cause of the public profligacy he had observed in the northern part of the island; but his sagacious mind might have traced it to the corrupt state of Scottish representation; whereby the Minister of the day, whoever he might be, could command the votes of the forty-five members, and a barefaced system of jobbing invariably prevailed. Scotland ought to place the statue of Earl Grey next to that of Sir William Wallace, for he has been her modern deliverer. Notwithstanding some partial defects in the Reform Bill for Scotland, it has substituted real election of representatives for an unreal mockery, and it has regenerated the political character of the people, who have shewn they were not unworthy of the great boon conferred upon them. There has been no bribery there. I can solemnly assert, that having stood two severely-contested elections for the city of Edinburgh, there not only was not a shilling given to any elector on our side, but not even a pot of beer, or a glass of whiskey; and I have every reason to suppose that the same course has been generally pursued both by our friends and by our opponents. Although no qualification is required in the representatives for Scotland, it has always happened that men of re-

spectable station in life, who might easily have given in a qualification according to the English law, have been elected. Among all the fluctuations of the last nine years, there has been no instance of a change of party among the representatives returned. And at the last general election when Tory ascendancy was strongly anticipated, and it was pretty plainly understood that patronage was to change hands, the electors remained true to their principles, and sent to the House of Commons as large a number of Liberal members as when the Whig Government was in its hey-day of power and popularity.

“ It betokens us not degenerated, nor drooping to a fatal decay,  
“ by casting off the old and wrinkled skin of corruption, to outlive  
“ those pangs, and wax young again, entering the glorious ways of  
“ truth and prosperous virtue, destined to become great and honour-  
“ able in these latter ages. Methinks I see in my mind a noble  
“ and puissant nation rousing herself like a strong man after sleep,  
“ and shaking her invincible locks ; methinks I see her as an eagle  
“ nursing her mighty youth, and kindling her undazzled eyes at  
“ the full mid-day beam ; purging and unscaling her long abused  
“ sight at the fountain itself of heavenly radiance.”\*

Scotland having received free institutions from England, returns the obligation by holding up an example of purity, firmness, and independence, at a time when there is a disposition to throw open the flood-gates of corruption, and to rush into servitude.

The time will come will come when such boroughs as Harwich must be disfranchised, and the spirit of the Reform Bill must be carried into full effect. But I agree with that distinguished statesman Lord Howick that the evils we still have to complain of, cannot now be cured by farther organic changes, and that for the present, we must trust to the returning good sense and free spirit of the people.]

# IRISH CHURCH.

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## INTRODUCTION.

ON Monday March 3rd, 1835, Lord John Russell moved the resolution, "That the House do resolve itself into a committee of the whole House, to consider the temporalities of the Church of Ireland." As the fate of Sir R. Peel's Government formed in December 1838, depended on the result, it excited great interest. At the conclusion of the third night's debate, a wish was expressed on both sides of the House, that it should not be protracted beyond one night more. Sir R. Peel said he hoped that Members who were still to address the House would sacrifice a part of their speeches to public convenience, and an understanding to this effect was come to. On the following evening I opened the debate.

### SIR JOHN CAMPBELL, ATTORNEY-GENERAL.

MR. SPEAKER, I will most cheerfully abide by the understanding entered into at the adjournment of the debate last night, that honourable Members about to address the House, shall sacrifice a part of their speeches to public convenience, in order that this discussion so important in its bearings, and so momentous in its consequences, may now be brought to a close. I should have been disposed al-

together to waive my claim to be heard, but for the circumstance that no member from that part of the United Kingdom, the metropolis of which I have the honour to represent, has yet taken part in the debate. It appears to me, that this is a question of all others on which the feelings of every part of the empire should be plainly expressed ;—and in supporting the resolution of my noble Friend the Member for Devonshire, I believe I act in unison with the opinions not only of the enlightened and independent inhabitants of the city of Edinburgh, but of the great majority of the people of Scotland. Themselves enjoying full religious liberty,—freed by the pious bravery of their ancestors from the insulting ascendancy of a dominant sect, they would wish similar blessings to be enjoyed by all their fellow subjects.

Sir, I am convinced, that the stability and happiness of this great empire depend upon an adherence to the principle on which this resolution is founded. I approve of the existing connexion between Church and State. I think it would be dangerous to trust entirely to the voluntary principle. It would be a pernicious fallacy to apply to such a subject the maxim that supply will be equal to the demand. The demand for the consolations of religion should be stimulated by ministrations which may enlighten the understanding and touch the heart. A religious establishment is above all necessary to afford religious instruction to the poor, and may be defended by the same arguments which prove that national education is to be provided by the State. An establishment and the voluntary principle work harmoniously together. The Establishment gives a steady standard of faith, and corrects the sectarian tendency to enthusiasm ; while the voluntary principle tends to correct the sloth and apathy which may creep in among a well-endowed clergy. For such reasons I respectfully and reverently approve of the churches of England and of Scotland, and, with certain suitable reductions, even of the Protestant Church of Ireland.

The Established Church in England accords with the sentiments of the great majority of the people ; her revenues are not excessive if they were properly distributed ; and she, no doubt, confers many

blessings on those within her communion,—although her usefulness may be extended by the abolition of sinecures, by the restriction of pluralities, by the enforcement of residence, and by the correction of other abuses with which from the hasty manner in which ecclesiastical reforms were conducted in the reign of Edward VI., or from a relaxation of pristine strictness, or from a change of external circumstances, she may be now chargeable.

I turn to the establishment in my own country with pride and exultation. Both in doctrine and discipline, it harmonizes with the religious sentiment of the great mass of the population. Of the enormous revenues of the Roman Catholic Church before the Reformation, a decent portion has been appropriated to the maintenance of a working clergy, who are neither pampered in luxury nor made dependent on the casual bounty of their flocks. Instead of the state now resuming any part of the moderate endowment of the Church of Scotland, it deserves consideration whether in some instances she has not a claim to restitution from the state of some property of which she has been unjustly deprived. In Edinburgh and in Montrose the whole of the tithes and church property were granted away. The consequence of which is, that the necessary expence of maintaining the clergy and celebrating divine worship, is defrayed by an assessment upon all the resident inhabitants, whether Presbyterians, Episcopalians, Roman Catholics, or Dissenters. I consider this a great grievance, and it affords the only exception to the proud boast of the Church of Scotland, that while she provides for the spiritual wants of her children in a manner at least as effectual and beneficial as falls to the lot of any Christian community, she creates no disability and imposes no burthen upon any who dissent from her.

When I come to Ireland, the subject of this resolution, I must say, that if it were *res integra*, I should hesitate long before I would consent to a Protestant establishment in that country; and if there were to be an endowed state religion there, I should have considered whether it ought not to have been that of the majority of the people, however much we may dislike it, not only from what we

regard as its errors, but from its admitting foreign interference, and its denial of the supremacy of the legislature. Finding, however, a Protestant Church established in Ireland, let it remain—on condition that it is accommodated to the religious wants of the Protestant population. I maintain, that the funds of this establishment being excessive ought to be reduced, and that the surplus ought to be applied for the general improvement of Christians of every denomination in the island.

There has been a great deal of contradictory statement respecting the amount of the revenues of the established church of Ireland. I care little for the exaggerations on either side. I look to the broad and undisputed fact, that the wealth of the Irish establishment is now as great as it was in the times of Popery, when the whole mass of the people was of the established religion. The immense landed estates and the tithes which formerly supported an establishment, administering to the spiritual wants of the whole population, are now monopolized by a church whose religious tenets are embraced by a small minority of the people, while the great majority who adhere to the antient faith,—the faith of those by whom the church was endowed—are left without any aid from the state for their religious instruction—the state, on the contrary, having systematically oppressed, insulted, and degraded them. The Protestant Episcopalians of Ireland do not exceed one tenth of the population, and the gross ecclesiastical revenue assigned for their benefit cannot be put lower than a million sterling a year. If the whole population were dealt with on the same scale, ten or twelve millions a year would be required. An establishment is provided for one sixteenth part of the population which would be sufficient for the whole. Looking to the number of souls under the care of the established clergy of Ireland, and the funds appropriated to their support, it will be found that the endowment of the church of Ireland is ten times as great as that of Scotland or England.

Is this state of things salutary, and ought it to be perpetuated? Is it for the good of religion or for the peace of the country? The effect of over endowment upon the clergy themselves it would be



invidious to dwell upon ; but I may be allowed to say without offence that in former times the Irish like the French bishops were frequently young men of family not always having a very scrupulous regard to morality or decency, that a considerable convocation of the parish priests was generally to be found at Bath and Cheltenham. How could residence be expected from the rector of a large and populous parish without a single Protestant family,—if he who imports a Protestant clerk must begin the service with the well known formula, “Dearly beloved Roger?” Can the example of such sinecurists be very edifying to the Protestant laity? Would not the handful of Protestant episcopals in Ireland have a better chance of due spiritual care and instruction, if their pastors were men who have spiritual duties to perform and who must devote themselves to the performance of their spiritual duties?

But what are the feelings of the Roman Catholic population, who are paying tithes to the support of this establishment—which they must consider the badge of their servitude and debasement? What but discontent, disaffection, insubordination, and insurrection, can be expected from such a system? We propose only that the superfluity of wealth which now cankers and corrupts, should be applied to purposes of benevolence as near akin as possible to the support of religious worship,—in the benefits of which all sects and classes will participate. You would not hear of any part of it being applied to make a provision for the Catholic clergy; but will you object to its affording the means of education to the rising generation,—teaching them to read the Holy Scriptures, and initiating them in those essential truths of our divine religion, which Protestants and Catholics in common believe.

But we are told of the expansive quality of Protestantism, and hopes are held out to us of making converts from Popery, by a numerous staff of well paid congregationless Protestant clergymen. Sir, it was not by such agents that Christianity was first propagated or that the work of conversion has ever been carried on. May we not judge of the future by the past? Is there not reason to dread

that the unendowed, the miserably paid, the never tiring, the devoted Romish priests are more successful in their proselitising efforts? The hon. Member for the University of Oxford has told us that there has been a great increase of churches in Ireland within the last ten or twelve years, and he seems to recommend acting upon the converse of John Knox's maxim, on which that great Reformer burned the Popish cathedrals, "Destroy the skeps and the bees will be dispersed,"—but the honorable Member has not denied that there has been a decrease in Protestant congregations, and he joins in the alarm that Popery may regain its ascendancy.

"Ill fares the land to hastening ills a prey,  
Where churches multiply and flocks decay."

I can say from my own observation, that the erection of an unfrequented Protestant church in a Roman Catholic district is considered a grievance by the absentee Protestant landlord, and an insult by the resident Roman Catholic tenantry. When about a year and a half ago I visited that beautiful and hospitable country, there were pointed out to me various instances of churches recently erected, where there were no Protestants—merely by way of job for the mason and the carpenter. One parish I was shown where these tradesmen had been so unconscientious that the church constructed by them had fallen down several times, and each time they obtained a fresh rate to repair it.

What effect on social order can be expected from such a system of ecclesiastical polity? Can there be a doubt that the compulsory maintenance by the Irish of a church, from which they not only differ but which they regard as the trophy of their conquerors, is the great cause of the enormities which for a long series of years have been committed in that unfortunate country? To the payment of tithes—enforced by many statutes, but considered by them a grievance and an insult—they have manifested an unconquerable resistance, and from thence they have contracted a general disregard of lawful authority—the source of many crimes. Any person

attending to the workings of the human heart might have anticipated such consequences. A decent provision for the maintenance of the Protestant religion in Ireland would have been submitted to without a murmur;—but unnecessarily and wantonly, not only to constitute the belief of a small minority the state religion—but to endow it as if it were the religion of the whole population, and to compel those who look upon it with aversion to contribute to its maintenance, must inevitably give rise to heart-burnings, jealousies, and discontent,—to an impatience of existing grievances, and not only to a desire of redress, but a thirst for vengeance. Your attempted justification from the alleged hope of conversion only renders the yoke more galling, as intimating an intention to force upon them a religious system which they have been taught to consider impious and heretical.

Various allusions have been made in the course of the debate to the history of my native country,—the religious controversies in which certainly afford a rich fund of political wisdom. The noble Lord opposite (Lord Stanley) has stated truly, that in the beginning of the seventeenth century, there existed very little animosity in Scotland between Episcopalians and Presbyterians. What was the cause of their harmony? The Presbyterians were then allowed the free exercise of their religion, and there was an adequate provision made for the Presbyterian clergy.

But when towards the end of that century a violent attempt was made to force Episcopacy on the nation, it came to be abhorred almost as much as Paganism itself. The House may recollect the dying words of the great Argyll, who declared on the scaffold that “he hated Popery, Prelacy and all superstition whatsoever.” Such was the perversion of feeling in Scotland produced by persecution, that at the time of the assassination of Archbishop Sharpe, that bloody deed was actually approved of by a majority of the people. The test of sound doctrine and a safe conscience was the answer to the question, “Was the killing of Archbishop Sharpe murder?” In consequence, Scotland was reduced to a state of insubordination and misery, exceeding any description of what has

been witnessed in Ireland in recent times. Men fled to the hill side to worship God according to their consciences—but with their claymores in their hands. We have heard much of Carrichshock and Rathcormac, but more blood was shed at Drumcleugh and Bothwell Brig. All industry was suspended; bands of beggars and freebooters wandered about;—the regular administration of justice was suspended;—martial law was proclaimed;—there were constant conflicts between the people and the military,—and the country was daily falling into a state of greater turbulence and greater suffering, till the Revolution of 1688,—when by the consent of William, the most liberal and the wisest of sovereigns, the nation was gratified by the establishment of their beloved presbytery—with a full toleration to every other religious creed. Need I remind the House of the tranquillity, contentment and prosperity, which Scotland has since enjoyed? Once more, there exists no animosity between Episcopalians and Presbyterians, and Dr. Chalmers after a visit to Lambeth, looks with great complacency on the English hierarchy.

Should not this example induce you to try, to accommodate the present state of the Irish Church to the religious condition of the country? Continue the establishment,—but reduce it to a scale proportionate to the religious wants of those who profess the Protestant Episcopalian faith in Ireland. A bold, and promising example has been set to us by the noble Lord opposite, in the suppression of ten Bishopricks. This motion proceeds on the same principle, and only asks, for inquiry, whether the disproportions of the establishment may not be still further corrected.

But it is said, that Church property is for ever inalienable—that however great its amount—however small the number may be whose souls are to be benefited by it—all property which has once belonged to churchmen, must for ever continue the property of the Church. For this doctrine there is no warrant in reason—in scripture, or in the law of the land. It is a remnant of heathenism. It was a maxim in Pagan Rome, that what was once appropriated to the service of the Gods, could never be resumed for any secular use. The infamous Clodius, seeking to spite a private enemy by taking

advantage of this, dedicated Cicero's Palatine House to the Goddess of Liberty, and it was not till the celebrated oration *Pro Domo* shewed the dedication to be irregular, that the property was restored. I mean no offence to any Roman Catholic, when I say, that the early Roman Catholic Church was always very ready to borrow from the Pagan religion any rite or ceremony that would be pleasing to the people, or any dogma which would be profitable to itself. That the patrimony of St. Peter might be for ever sacred, that the banner of the successor of the humble fisherman, might for ever wave from the capitol, that the wealth gained by priestly fraud or violence might continue for ever to pamper priestly pride, luxury and indolence,—the doctrine was early adopted, and resolutely maintained by the Popes,—that to touch Church property under any circumstances amounts to the sin of sacrilege, for which absolution cannot be asked in this world nor pardon expected in the next.

This was the doctrine objected to Henry V., when he meditated some ecclesiastical reforms for the benefit of his own revenue, and it was acted upon in England down to the time of the Reformation. Such an impression had it made, that even among Protestants the title of the grantees of the Crown of the lands of the dissolved monasteries was doubted, and it was apprehended a curse would fall upon the families enriched by such grants. But such superstitious notions have long passed away, and is it to be supposed that in the nineteenth century, in this reformed Christian realm, the progress of improvement is to be arrested by the example of Pagan or Papistical Rome? I must say, Sir, that the objection comes with a peculiarly bad grace from a Church upon which its possessions were bestowed by an act of the Legislature—being taken forcibly from the Church to whom they were originally granted. Without farther pressing this *argumentum ad ecclesiam*, I will say, that the property of the Church ought not to be touched while it may be beneficially applied to the purpose for which the grant was made. But I hold that the grant was by the state—that the state is to superintend the application of the property granted, and that

it is in the power of the state, without sacrilege or injustice, or cause of complaint, to resume any part of this property and apply it to other purposes when such a course would tend to the good of religion and the public welfare. I know of no distinction between the remuneration to functionaries in the Church, and other functionaries acting for the public. "They which minister about holy things have of the things of the temple, and they which wait at the altar are partakers with the altar." So a Judge presiding in a court of justice, a Minister of State, a General commanding an army, and all their subordinates, labouring in the service of the public, ought to be supported at the public charge. It may often be convenient that there should be an appropriation of particular funds to a particular department; but this is not essential; when there is a deficiency in the appropriation it must be supplied—when there is a superfluity it may be transferred to another department, or to the general revenue. The vested rights of individuals are not to be disturbed by any resumption or new distribution, but these being protected the appropriation of the property remains with the state, by which it was granted,—always subject to the implied condition that the public good requires a change in its destination. No individual, has an interest beyond his own life, and even if you technically suppose the Church to be a sort of aggregate corporate body, capable as such of holding property, the Church can make no complaint if its revenues are kept in correspondence with its exigencies.

I apprehend that this view of the subject is fully borne out by the origin and history of tithes in this country. It is well known, that tithes were at first in the nature of a tax on all property for ecclesiastical purposes. When the Christian religion was first planted in this island, its ministers were supported by the voluntary oblations of the faithful. By and by, all were expected to contribute a tenth of their substance, and afterwards this became a legal obligation. But by law there was long a fourfold division of the tithes—one part to the Bishop,—one to the Incumbent of the parish—one to repair the fabric of the Church—and a fourth to the Poor. An

alteration was afterwards made, which could only have been by the Legislature; and bishopricks being amply endowed by landed possessions, the parochial clergy contrived to get the whole of the tithes for their own use,—the repairs of the Church being left to the parishioners,—and the poor thrown upon charity. Having regard to the rights of individuals, why might not the Legislature again interfere and regulate the enjoyment and application of property created by the state and always under its control?

Where land has been given to the Church, this is still to be considered a recompence for services to be performed, and the state has a right to see that some proportion is preserved between the services and the recompence. The office of Master of the Rolls in England is endowed with a large estate in houses. The management of this estate has been repeatedly regulated by act of parliament and is now brought to the public account, the Judge being allowed a fixed salary out of the public revenue. Suppose the rents of that estate had risen to 50,000*l.* a-year, might not the surplus beyond an adequate salary have been justly applied to another branch of the public service, without a cry that the Law was robbed? Within the last few years the salary of the Chief Justice of the King's Bench, has been reduced from 10,000*l.* to 8,000*l.* a-year, and that of the Lord Chancellor of Ireland has been dealt with in the same manner. Would it have made any difference if their incomes had arisen from Land—and is there any difference in this respect between the Law and the Church? When it is said, that there is some spell by which the property of the Church, however excessive, can never be touched; let me suppose, that from the pious prodigality of our ancestors the greatest part of the public revenue had been given to the Church, so that the clergy might be rioting in sensuality, while there were no sufficient funds to provide for public education, or for the safety of the kingdom against the invasion of a foreign enemy—is it meant to be said, that this would not be an abuse—is it meant to be said, that this abuse never can be remedied? At the era of the Reformation in Scotland, not less than one third of the landed property of that country belonged to the Church. The Scottish parliament as-

signed what was considered an adequate portion of this property for the use of those who were to minister at the altar, and another for general education. The residue, I am afraid, went in wasteful grants to court favourites, but would not have been misapplied in defraying the expense of any useful public establishment.

Then, I ask, might not the Irish parliament, before the Union, have lowered the incomes of dignitaries in the Church which were excessive, and reduced the Church establishment to the wants of the Protestant population? The Under Secretary for the Colonies, (Mr. W. Gladstone) has allowed that such a power would have belonged to the Irish parliament. Why has not the Imperial Parliament the same power? Was it not one great object of Mr. Pitt, in bringing forward the measure of the Union, to mitigate the insolence of Protestant ascendancy in Ireland and to elevate the condition of the Catholics? What article is there in the Act of Union, to require that the Irish Church establishment in its bloated magnitude shall remain for ever intact? Did the noble Lord, the Member for Lancashire, overlook this article in his suppression of the ten Bishopricks?

The Irish Church is to be maintained, so as that it may best answer the ends for which it was established. I apprehend that the Articles of Union are to be interpreted and modified according to the exigencies of the public welfare. This principle was acted upon in a most distinguished instance, while the Right Honourable Baronet opposite was Secretary of State for the Home Department. By the Articles of Union with Scotland, it is provided that the Court of Admiralty existing in that country should be preserved. Under the sanction of the Right Honourable Gentleman, an attempt was first made to reform and improve it, and this being found impossible, it was entirely abolished. Then, Mr. Speaker, as you well know, in the Scottish Articles of Union, there was a similar provision respecting the Court of Exchequer. If it has not shared the fate of the Court of Admiralty, its functions have been transferred to the Judge of another Court and it has no longer a separate existence. But this alteration has been generally approved of; for



any business which the Court had is now as well transacted, there has been a considerable saving to the public, and you, Sir, instead of presiding in a mock Court, which sat only to adjourn, being elected one of the representatives of the metropolis of your native country, are most usefully and honourably employed in presiding over our deliberations in this House.

But, Sir, if instead of Church property having originally belonged to the State, as I aver, and having been conferred by the State, it had all been the gift of an individual, the proposition of my Noble Friend, the Member for Devonshire, to go into a Committee on the temporalities of the Church of Ireland would have been equally unobjectionable. I will not say, as some do, that all mortmain property, the moment the grant in mortmain is made, becomes the property of the state, and may be applied to any useful purpose. I think the will of the Donor is to be observed as long as circumstances remain the same as at the time of the gift and his real intentions can be carried into effect. It is the well known doctrine of Courts of Equity, that where property has been given for charitable uses, and the object of the charity fails, or from an unexpected increase of the fund a surplus remains after the specific object is effected, there shall be a reference to the Master to frame a new scheme analogous to the original charity, such as the donor if alive would probably approve of. If the property of the Irish Church was a gift by individuals,—by whom and to whom, and under what circumstances was it given? By Catholics, to Catholics, when the whole population was Catholic. Is the will of the donors observed by appropriating the whole to the religion of 500,000 Protestants, when there are seven millions of Catholics in Ireland? With the most sincere respect and regard for many Roman Catholics, I certainly regard that religion with no favour, and when I consider the inordinate power which it gives to the priesthood, and the degree to which, when in full vigor, it cramps inquiry and enervates the human mind, I should rejoice in the use of any legitimate means of winning converts from its errors. But can we be justified in treating it as a hurtful superstition, not to be endured in a

Christian country? Through how many Roman Catholic Bishops maintaining the same doctrines now professed in the Vatican must our Protestant Bishops of the Church of England trace the authority they claim in unbroken succession from the Apostles? Is not a priest ordained by a Roman Catholic Bishop at this day considered as in sacred orders, and may he not be admitted by our Church to administer the sacraments without fresh ordination? The Pope himself is recognized by our Church as a Christian Bishop, the legitimate successor of St. Peter. What right have you, then, to disregard the intentions and wishes of the donors of this property? There is no pretence for saying, that they gave it to the National Church for the time being, whatever might be the tenets of that Church. This would still place the property at the disposal of the Legislature, by which the national Church is established and regulated.

I feel that in the present temper of the public mind, there are insuperable difficulties in the way of a proposal to apply any part of the revenues of the Church of Ireland towards the endowment of the Roman Catholic clergy; and my Noble Friend wisely avoids what is impracticable. But if the present revenues of the Irish Church are excessive, why may not the surplus be applied to the moral and religious instruction of all parties? To justify inquiry, we have only to show that there may be a surplus, and that this may be a just application of it.

I cannot doubt, Sir, after the turn which the debate has taken, that the resolution will be carried by a considerable majority. What the effect of carrying the resolution may be it is impossible for me to anticipate; but I can most unfeignedly declare I should rejoice to find that the Right Honourable Baronet bowed to the opinion of the House, and continued in office to carry it into effect;—that after some more “sharp convulsive pangs of agonizing pride” he should again make a sudden wheel, disregard the bigoted section of his adherents, and conform to the general sentiments of the country. If the Right Honourable Baronet will manifest the same deference to public opinion with respect to appointments to

foreign courts which he has recently done,—if he will shew himself a conformer in the other departments of the State, — if he will govern the country upon liberal principles, suitable to the present age, and the actual state of society,—I, for one, wish to see him with his colleagues sitting on the benches which they now occupy. I humbly tender him my advice not to lag too far behind the march of intellect, and not to recant when it is too late. Let him lead the way in public improvement, and, as Minister, he may lay the foundation of a splendid reputation, and confer the most solid benefits on his country. I was connected with the late Government;—but I can truly say, that to return to office is no object of ambition with me. From my station at the English bar, it is more profitable and more agreeable for me to remain an independent member of this House. But if the Right Honourable Gentleman will not change his course, if he will allow himself to be overruled by colleagues who still adhere to the antiquated maxims of genuine Toryism, it is of the last importance for the good of the community the present Administration should as soon as possible be brought to a close. I sincerely love a constitutional monarchy, as not only avoiding public convulsions, but giving a more steady effect to public opinion than any other form of Government. I respect the prerogative of the crown in the choice of its Ministers. But from an abuse of that prerogative, the monarchy of this country has recently sustained a deep wound. An Administration was dismissed while in the full confidence of Parliament and of the country,—and an attempt is now made to rule the country contrary to the wishes of a majority of the House of Commons. The conduct of Mr. Pitt in 1784 affords no precedent for the course at present pursued. Now, for the first time in the history of the English constitution, the Minister having a Parliament of his own choosing, is in a minority, and remains in office. Mr. Pitt struggled against a majority in a Parliament called by his rival, and had the voice of the country in his favour. Can the Right Honourable Gentleman, if he thinks fit again to dissolve Parliament, rely upon popular favour, and expect a more favourable result from a

second general election ? I can only say, that I am convinced from all I have observed, and all I have heard, that the present Cabinet since coming into office have done enough to injure their public character with one section of their own party, without having conciliated any of their opponents. They have gone far enough to shew that they have no regard to consistency, but they have not gone far enough to satisfy the just wishes of the community. Any confidence that might be produced by the Right Honourable Gentleman's own character vanishes on looking at his Cabinet, by whose advice Lord Londonderry was appointed ambassador to Russia, and a charter was refused to the University of London. Indeed, I may say, that the Right Honourable Gentleman, bestowing much praise upon himself, has not ventured to defend his Cabinet. To lighten the vessel of the State in the storm he throws all his colleagues overboard. He dwells on his own consistency, his own high principles, his own disinterestedness, and his own devotion to the public cause. But supposing him to be a paragon of ministerial excellence, does he fill all the offices of the Government?—and if his colleagues were contented to be mere cyphers, are we to suffer the whole power of the monarchy to be engrossed by one man ? Are we to be under a similar rule to that of the three weeks which occurred in the expectation of the return of the Right Honourable Gentleman from Rome, when the Duke of Wellington was at the head of the Treasury and the Admiralty, and held the seals of three Secretaries of State ? Is this dangerous precedent to be followed, and are we henceforth to live under the dictatorship of a single man ? This, Sir, is not the constitution of England, which requires, that in each department of the State there shall be a responsible adviser of the Crown, enjoying the confidence of the nation. If the Right Honourable Gentleman, following the examples of Buckingham and Strafford, should be mad enough to try to supersede Parliament, and to govern in defiance of public opinion, let him remember the resources which we enjoy to obtain redress. Such misrule would not have been endured before the Reform Bill, and now will be brought to a speedy termination. I look forward

to the struggle with deep regret, but without apprehension as to the result. I dread disturbance,—I dislike agitation,—I wish for repose—"Peto pacem." But I am prepared for any measures which may be necessary to give us a Ministry in unison with the sentiments of Parliament and the people.

Before sitting down, I must be permitted to say, that I last night heard with the deepest grief the declaration of the noble Lord, the Member for Lancashire (Lord Stanley), as well on account of his own reputation, as of the public interest. Having had an opportunity of appreciating the vigour of intellect,—the high acquirements,—the eloquence,—the liberal and independent principles of that noble Lord, it did afflict me more than I can express to hear him openly declare, that however great the property of the Episcopal Church in Ireland might be, and however few its members, in his judgment that establishment must continue for all time to be supported as it now exists. May I be permitted to ask, whether with respect to this subject, the noble Lord is not under some unaccountable delusion,—a spell is not cast upon him,—he does not labour under a sort of *monomania*? He goes greatly beyond, not only the Right Honourable Member for Tamworth, but the Honourable and Learned Member for the University of Dublin, and the Honourable Member for the University of Oxford, who do not justify their resistance to all change by disclaiming all consideration of proportion between the object and the means by which it is to be accomplished. Reasoning with such infatuation must be vain; and I can only express a fervent wish that this question of the Irish Church being speedily settled, the cloud which has obscured the mind of the noble Lord may pass away, and he may be restored to that party of which he would again be the life and ornament.

Against the opinion of the noble Lord I think I may set off that of the illustrious chief under whom we both served with such pride and pleasure. I certainly have no authority personally to declare the sentiments of Earl Grey upon this resolution; but I apprehend there can be no doubt that he entirely approves of it. The noble

Lord differed from him on the 147th section of the Irish Tithe Bill—the famous appropriation clause. That difference was the occasion of the noble Lord's unfortunate secession from the Government of Earl Grey. But Earl Grey adhered to the appropriation clause,—which in substance declared, that the temporalities of the Church of Ireland are subject to legislative control, and that due regard being had to the spiritual wants of Irish Protestants, any surplus in the revenues of the Irish Church may be justly appropriated to the moral and religious instruction of all parties. Earl Grey is not a visionary,—he is not a destructive,—he is not an enemy to Church establishments,—he is not only admired for his talents, but allowed even by political opponents to be a man of moderate, rational, and constitutional principles.

I will not detain the House longer. I hope I have kept my engagement not to stand long in the way of others who may be desirous of addressing them, and I have warmly to thank them for the attention with which they have honoured me.

In what I have said I am sure I meant nothing personally disrespectful to the Right Honourable Baronet opposite. I am not blind to his good qualities ;—I am convinced that in his heart he is not a bigot ;—I have great hopes of his open conversion,—and I could almost say to him

“ Cum talis sis, utinam noster esses !”

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[NOTE.—The resolution was carried by a majority of 33. This led to the resignation of Sir Robert Peel, and the formation of the Government of Lord Melbourne, which lasted from April, 1835, to September, 1841.]

# ENGLISH CHURCH RATES.

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## INTRODUCTION.

ON the 3rd of March, 1836, Mr. Spring Rice, then Chancellor of the Exchequer, in a Committee of the whole House, moved a resolution, "that for the repair and maintenance of parochial churches and chapels in England and Wales, and the due performance of divine worship therein,—a permanent and adequate provision should be made out of the encreased value given to Church lands, by the introduction of a new system of management, and by the application of the proceeds of pew rents; the collection of Church rates ceasing altogether from a day to be determined by law." The substance of the measure was to change the tenure of Church lands so that the lessees would have an opportunity of purchasing the fee-simple—the lands to be charged with a perpetual corn-rent;—and not only all present interests would be preserved, and there would be for ever secured to all dignitaries in the Church, an income equal in value to the amount now received by them, but a large surplus would arise,—which was to be appropriated to the repair of parish churches and the purposes to which Church-rates are now applicable,—whereupon Church rates might be abolished.

The debate on the Resolution began on the 13th of March, and was adjourned to the 14th. On that day Sir W. Follett began with a very able speech against the Resolution, to which I attempted the following answer.

## SIR JOHN CAMPBELL, ATTORNEY GENERAL.

MR. SPEAKER.—I, on the contrary, shall vote in favour of this resolution, as I think it will give peace and security to the Church, and confer great benefits on the public. I feel myself called upon, after the appeal which has been made to me by my Honourable and Learned Friend, the Member for Exeter, to explain to the House why it is that I can neither agree with his law nor his reasoning. It seems to me, that my Honourable and Learned Friend has been misled by the zeal he always displays as an advocate, and is blind to the defects of the case he has undertaken to patronise.

I will not yield to my Honourable and Learned Friend, in regard for the Established Churches in this country. I am affectionately attached to that Church in which I was reared, and of which my father was a venerated pastor. I likewise look with the greatest respect to the Church of England, harmonising with the belief of the great mass of the population,—and from the purity of her doctrines, and the pious labours of her clergy, spreading the benefits of morality and the blessings of religion over the land. I wish to see her in the enjoyment of all her rights and privileges,—and the object of this measure is, that her permanence may be secured, and her usefulness extended. I cannot trust to the voluntary principle for giving religious instruction to the people. I assume, that there ought to be an establishment, and that provision must be made by law for the building and repairing of churches, and for the necessary expence of the decent performance of religious worship.

The question is, whether the present provision for these purposes, by means of an assessment on all the inhabitants of the parish, of whatever religious persuasion, is satisfactory; and whe-



ther another may not be substituted for it? In my humble opinion a change in the law is not only expedient but indispensable; and there is no change less objectionable than that which we now propose.

My Honourable and Learned Friend began his speech by taunting us for inconsistency. It would have been more delicate perhaps, if he had first cast a glance to his right, and considered the feelings of Members now sitting on the same bench with himself at the mention of such a topic. I should be glad to know how the noble Lord, the Member for North Lancashire, is to oppose this resolution, and to maintain his consistency. He may say truly, that he has altered his opinions respecting the sacredness of Church property, and the eternal obligation on Catholics and Dissenters to pay Church-rates; but this resolution, which seeks only to alter the tenure of Church property in England, the interests of the Church and of all Churchmen being for ever preserved, and to provide for the repair of churches and the proper celebration of divine worship in England from a fund to be thus created, cannot be very consistently resisted by the author of the Irish Temporalities Act,—which, by the very same means, effected the very same objects in the sister kingdom;—and under the same circumstances,—for it must be admitted, that in Ireland the tenure of Church property was the same as in England,—and the law of Church-rates was the same. The noble Lord has ingenuity to do all in this House which is not impossible; but in attempting to show that he now consistently opposes this plan, which is copied from his own, he can hardly delude himself, and he certainly can convince no one else.

My Honourable and Learned Friend says he dissents from the law as laid down by the Chancellor of the Exchequer respecting Church-rates. I can only say, that I believe it to be the law of England, and I would stake any professional reputation I may enjoy, that it will be sanctioned by judicial decision. There is at present no practicable mode of compelling the inhabitants of a parish to repair the church, and we offer you a method by which

churches may certainly be repaired without strife,—without litigation,—without a murmur of discontent.

I deny that in England Church-rates are like tithes, to be considered a charge upon land. I think the Right Honourable Gentleman opposite, the Member for Tamworth, was right last night in what he said respecting the repairs of churches and glebe houses or manses in Scotland. Land there is held on the condition that such repairs shall be done by the heritors or landowners,—as land is sometimes held in England on condition of repairing a bridge or a highway. But in England Church-rates are in point of law a personal tax, in proportion to the ability of the inhabitants, and according to all the authorities from Lord Coke downwards, the tax is on the person in respect of the land. It would be neither amusing nor instructive to the committee to enter into a lengthened inquiry respecting the origin of Church-rates in this country. There can be no doubt, that originally churches were built and repaired from a portion of the tithes set apart for that purpose. At what time the whole of the tithes were ingrossed by the incumbent for his own use, and the expense of building and repairing the nave of the church was thrown upon the parishioners, does not distinctly appear. The change was probably gradual, and what was at first an abuse or an encroachment, ripened into law. The contributions of the faithful towards supporting the fabric of the church and the performance of religious worship, once voluntary, were enforced by ecclesiastical censures, and the civil courts, which long interposed to protect the laity from ecclesiastical encroachment, as papal influence increased, were forbidden to interfere. The obligation must now be considered as resting on the parishioners,—but still it is not a charge on the land, and the land is only taken as a criterion of ability. Personal property was equally liable, although for convenience it is now generally excluded from the Church-rate,—in the same manner as the Poors'-rate is now laid almost entirely on the land, although under the 43rd of Elizabeth the personal property of resident parishioners is equally rateable. So lately as the year 1824, the Court of Delegates, the highest ecclesiastical tribunal,

held that in the town of Poole ships might be included in a Church-rate.

Is it just then, that such a tax should now be imposed upon those who derive no benefit from the Church it goes to support? In its origin it was based on equity and justice,—being a contribution by all for the benefit of all,—when all were of the same faith, and worshipped together in the same temple, under the same spiritual guides. But now, that there are so many different religious persuasions tolerated and supported without aid from the State,—it is most unjust that the dissenter should be called upon to provide places of worship for others, when he is put to the expense of providing his own place of worship, and supporting his own pastor. I cannot adequately express my astonishment at the attempt of my Learned Friend to draw an analogy between Church-rates and tithes,—which are, indeed, a charge upon the land, and not a tax,—which no man pays for when he buys an estate subject to tithes,—and which are frequently purchased, and held as a separate lay fee, and made the subject of devise, settlement, and mortgage.

Can it be for the benefit of the establishment, obstinately to adhere to a mode of repairing churches which gives rise to such bickerings,—such scandal,—and such litigation? The frequent disturbances within the walls of the sacred edifice itself, at meetings for the making of a Church-rate, were very forcibly described by my Right Honourable Friend, the Chancellor of the Exchequer, in introducing these resolutions. I can add, from my own observation and knowledge, that the litigation upon the subject is without end, and is of the most harassing, embittering, expensive, and noxious description. A case is known to my Honourable and Learned Friend, the Member for Huntingdon, and myself, where, to enforce the payment of an assessment of 3*l.* or 4*l.* an expense of some thousands has been incurred. An infinite number of nice questions may be raised concerning the validity of the rate, and where the rate is unquestionably valid, the enthusiast who goes to gaol rather than pay it is regarded as a martyr. From these causes Church-rates

are becoming every day more odious, and unless a different fund be substituted for them, I am afraid that those buildings raised by the piety of our ancestors, and with which such solemn and tender associations are connected, may become a heap of ruins.

My Honourable and Learned Friend, almost admitting that a change in the law is necessary, proposes, that the remedy for enforcing Church-rates should be made more stringent. Sir, if resistance to Church-rates were made felony without benefit of clergy, or in the mitigated spirit of modern criminal legislation, an offence to be punished with transportation for life,—Church-rates could not be collected, and the people would not submit quietly to the impost.

Those who would wish Church-rates to continue, are bound to bring in some bill upon the subject. This cannot be the duty of us who say that they ought to be abolished. At present there is no mode of compelling the making of a rate for the repairs of the church, however much it may be dilapidated, or for providing what is necessary for the administration of the Holy Sacraments. When a rate has been duly made by a majority of the vestry, the payment of it may be enforced by an information before a magistrate, or a suit in the Ecclesiastical Court; but there is no mode in which the parish can be compelled to impose the rate.

The Court of King's Bench would laugh at my friend if he were to apply for a mandamus to the vestry to make a Church-rate. In the olden time there was a remedy, and an effectual one. If the church had not been repaired and proper vestments and chalices, and candlesticks provided, the Pope would have put the parish under an interdict, the parishioners would have been cut off from book, bell and candle—would have been deprived of all the ministrations, rites and consolations of religion. But since the Reformation this remedy is gone, and as yet it has been replaced by no other.

The Right Honourable Member for Tamworth, not being able to contend that things can go on as they are, threw out suggestions last night, that a distinction might possibly be made between

members of the Church of England and Dissenters, or between town and country parishes, or that the assessment might be made upon the owner of the land and not upon the occupier :—but he does not come forward with any specific motion on the subject, and none of his suggestions go to the root of the evil, and cure the defects of the present system or provide a substitute. For example—what definition could be given of a town parish, and what of a country parish, and how would the town and country parts of the same parish agree, and how would members of the same Communion bear to be dealt with differently, as they reside in the town or the country?

The only practicable plan to be put into competition with the present, is that which was proposed by Lord ALTHORP in 1834, while the noble Lord the Member for North Lancashire still belonged to Lord GREY's Cabinet. What share the noble Lord had in originating that plan it is impossible for me to say, as I only held a subordinate office in the Government, and did not know the parts played by my superiors ; but there is one feature in it which I cannot approve, and which subjects it alone of all the measures brought forward by the Government since I have had the honour to be connected with it to the imputation of "*thimblerrigery*." Who suggested it I do not know, but the noble Lord, as a Cabinet Minister, must at any rate have been present when it was discussed and agreed to. The Bill of 1834, for abolishing Church-rates in England, enacted that the expence of repairing churches in England should be a charge upon the land-tax of England. The only conceivable view in such an enactment, must have been to prevent the remonstrances which might have been expected from Scotland and Ireland, if the charge had been directly placed upon the Consolidated Fund. Would not the effect have been precisely the same, whether the deduction was made from the Consolidated Fund, or the English Land-tax ?—from the aggregate amount of the imperial revenue, or one of the items of which that revenue is composed ? But the device was easily seen through, and the people of Scotland immediately perceived that they were to be taxed to

repair churches in England. My constituents in Edinburgh felt themselves particularly aggrieved, as they are subject to a local tax for the maintenance of their own ministers. This was felt so strongly that upon a representation to Lord Grey's Government, I was authorized to prepare a clause whereby the Edinburgh annuity-tax should be abolished, and the amount paid from the public revenue. Edinburgh would thus have made a fair bargain: but what was to be said to other parts of Scotland on which a new burthen was imposed without any relief? What was to be said to Ireland where their own Church-cess had been abolished without any permanent contribution from the State? What was to be said to the Dissenters in England, who continue to maintain their own chapels and pay their own pastors? Notwithstanding the objections to this measure, I should have been glad to have seen it carried, subject to certain modifications, if there had been a disposition to receive it as a measure of peace. But although it was supported by a considerable majority in this House, it was highly unpopular out of doors—it was more disapproved of the more it was discussed, and it was necessarily abandoned by the Government. Remember, however, that it was warmly supported by Gentlemen opposite, although it relieved the land from a charge which they now resolutely say, being immemorial ought to be perpetual. Indeed the Right Honourable Gentleman, the Member for Tamworth, has not always entertained the same opinion respecting the eternity of Church-rates;—as he once gravely proposed that the County-rate should be the fund from which the expense of repairing churches and providing for public worship should be defrayed.

Nothing remains then but to canvass the merits of the plan proposing that by an improved management of Church lands, the necessary fund should be provided without injury to the Church, or its lessees,—and with a great addition to the produce of agriculture and to the wealth of the community.

I admit, that we are bound to make out all the three propositions which have been successively combated by my Honourable and Learned Friend, the Member for Exeter,—bolder and more

adventurous than the Honourable and Learned Member for Bassetlaw, who, I understood, to concede two out of the three. The propositions are,—First, that the plan would produce an adequate fund. Second, that the fund would be raised without injury to any one. Third, that this is the proper application of the fund.

From the first point, which is much more familiar to other Members than to me, or probably to my Honourable and Learned Friend, I shall rely on the calculations of the Chancellor of the Exchequer, confirmed by the most eminent actuaries, and adopted by the Honourable and Learned Member for Bassetlaw, who was cradled amidst leases and renewals. It would indeed be strange if, notwithstanding the acknowledged improvident management of Church lands, and their decreased value from the present prejudicial tenure on which they are held, there would not be the required surplus, after securing to the Church the full amount of profit which she now receives from them.

Who then would be injured by the change? Certainly not the present dignitaries of the Church, nor their successors. I cannot help thinking, that they will be pleased to be relieved from the secular occupation of consulting land-surveyors and actuaries, and poring over tables for calculating the value of lives and annuities. This is as alien to their sacred duties as the occupation of the Bishop of Durham, who marched forth armed *cap a pie* at the head of an army to fight the Scotch, or the unfortunate prelate, who being taken prisoner in battle, and reclaimed by the Pope, gave rise to the memorable answer, “Is this thy son’s coat?” Suppose the Lord Chancellor, the two Chief Justices, and the Chief Baron of the Exchequer, were now paid by the varying rents and profits of certain estates annexed to their respective offices, would it not be much better that these should be handed over to the public, and that fixed salaries payable quarterly should be assigned to these high legal functionaries? On this principle their salaries have been fixed; and with respect to the Master of the Rolls, the course now recommended has been literally pursued, for there was a landed estate annexed to his office, and that has been transferred

to the management of the Woods and Forests,—his Honor being free from the distraction of leases and renewals, and regularly receiving his fixed allowance like the other Judges. A Bishop in future will not be able to run his life against the lives in a lease, but he will have nothing to impede him in the race to immortality.

However, my Honourable and Learned Friend warmly resents the wrongs of the lessees, who as far as I can learn, instead of themselves making any complaint, are disposed to accept the measure of the Government with the greatest satisfaction. I have paid great attention to the subject of legal tenures,—and I have no hesitation in saying, that the system of successive reversionary leases or fines, is the worst that ever was devised. It is not only wasteful to the land-owner, but often most vexatious to the tenant, who is not entitled to a renewal *de jure*, and who is constantly in danger of an excessive fine being exacted from him, or of a scheme to let the lease run out, so that he and his family may be ejected. But above all, this system is injurious to the public wealth. What prudent church lessee will plant trees, erect buildings, or lay out money in any permanent improvement, when there is a fine to be paid once in seven years, and the amount of this fine is to be estimated according to the improved value of the premises? In Sussex, where copyhold tenure is very common, and the copyholder cannot cut timber without the licence of the lord, it is a common saying, that “the oak is too noble a tree to grow on servile soil:”—meaning, that trees are not planted where the person to plant may not cut down the timber,—the consequence of which is, that in travelling in that country you may tell the tenure of the land you pass, as it is well wooded or waste. The copyhold fines on descent and alienation, with the restriction to cut timber, or dig for minerals, are less prejudicial to agriculture and general improvement, than the reversionary leases or fines; for the copyholder knows that the lord must re-grant according to the custom of the manor,—whereas the Church lessee, were he to lay out capital, would be completely at the mercy of the lessor. It has been said, that large portions of the metropolis are built on



Church lands. This is true, but only where special acts of parliament have been passed to secure a long term to the lessee at a fixed rent, which is an approximation to the plan now proposed. According to this plan, the lessees may on fair terms become owners of the inheritance, and may and will eagerly plant and improve for the benefit of themselves and their posterity. All vested rights being respected;—the dignitaries of the Church, by the perpetual rent-charge advancing as the price of corn advances, being for ever assured of receiving an income equal to that which arises from the present system—and the lessees being converted into owners in fee-simple, with great benefit to the public,—I am surely justified in contending, that if the expected fund does result from the change, it will be raised without injury to any one.

How then is the fund to be applied? I say—so that it may best promote the good of the Church, and the interests of religion. Apply it in repairing churches and providing for the decent celebration of divine worship according to the rites of the Church of England. Is not this an ecclesiastical purpose? is not this a spiritual purpose? is not this a purpose in conformity to the will of the Donor? All the specified objects of the gift being amply satisfied, is it a misapplication of an unappropriated surplus to employ it in sustaining sacred edifices, and in procuring bread and wine for the Holy Communion?—in restoring peace and harmony among Christians?

But, says my Honourable and Learned Friend, employ it in new endowments. No one can feel more strongly than I do the importance of religious instruction,—and I do not dispute, that in some places where population has suddenly increased, pecuniary aid is wanted for supplying it. However, I believe that the extent of religious destitution has been considerably exaggerated, and I am sure it cannot be accurately measured by merely counting the population of a parish, and calculating the number of persons who may be accommodated in the parish church,—dismissing altogether from consideration the places of worship within the parish belonging to various classes of dissenters. In the manufacturing parts of

Cheshire, from which the most appalling statements of this kind are furnished, I am informed that a very large proportion of the population are dissenters,—that they have now ample means of worshipping God according to their consciences, and that they would derive no benefit from fresh episcopalian endowments. When such endowments are really required, I hope that we may trust to see them supplied by the zealous and generous exertions of members of the establishment, by which much has been already accomplished. At any rate, I say, first provide for the efficacy of existing endowments. Repair the churches that have been built and are in danger of falling into ruins, before you build new ones. Protect the establishment from the angry feelings now engendered by the making and collection of Church-rates. I own I do not attach much weight to the argument, that the payment of Church-rates by dissenters may be contrary to conscience. I give no sanction to the practice of setting conscience against law. The law must be supreme, and if you were to suffer men to debate, whether they can conscientiously obey the law, it would often happen, that conscience would be guided by interest, prejudice, or passion. But while a man pays the tax imposed upon him to support a religion from which he differs, I think he may justly consider himself aggrieved, and I cannot wonder if his feelings are not very friendly towards an establishment which imposes upon him such a mark of subjection.

Sir, I look forward with the most sanguine hopes to the pacificatory and healing effects of this measure. Tithes having been commuted, if Church-rates were abolished,—the fabric of the church being repaired, and the expences of divine worship being provided from this new-created fund,—the Dissenters would have no real cause of complaint, and the establishment may boast that it imposes neither burthen nor disability on any who dissent from it. Being regarded with universal respect and good will, is it not more likely to spread and to turn sinners to repentance than when represented as grasping, domineering, and avaricious? The Right Honourable Member for Tamworth has tried to frighten us by reading extracts from

publications, which teach doctrines subversive of all establishments. But be not deterred from doing what is just by the apprehension of some ulterior demand which ought to be resisted. Retreat to the vantage ground of timely and fair concession, and there you will make an effectual stand. I hope the House will not be led away by intemperate effusions here or elsewhere, but judge the measure by its own merits. I beg to ask Gentlemen opposite if they are prepared to adopt the sentiments of all those who in this controversy have taken part with the Church. Will they be answerable even for all that is said by every dignitary of the Church *ex cathedra* in addressing his clergy? I have lately read a visitation charge of the Right Reverend the Bishop of Exeter, who, I understand, complains that the Attorney-general does not prosecute libellous and irreligious publications. Now I must say, that of all the publications which have come under my notice since I have been Attorney-general, this visitation charge seems to me to be one of the most libellous, and when I file my first *ex-officio* information, I shall begin with the Bishop of Exeter. I have not as yet exercised this prerogative of my office, and I do not believe that any public prejudice has arisen from my forbearance, even when such attacks upon the constituted authorities of the country, such vituperation of the legislature, and such incentives to disobey the law, issue from the press as are to be found in this public charge. A sufficient corrective and sufficient punishment may be found in the indignation and disgust which they excite. But I may ask Honourable Members opposite, if it was decent to say, speaking with disapprobation of the Dissenters' Marriage Bill, passed by King, Lords and Commons, "that no sane man would some years ago have had the hardihood to propose such a measure?" Was it decent for the Right Reverend Prelate to accuse the Members of this House professing the Roman Catholic religion of "treachery and perjury?" Was it decent to charge the King's Government "with seeking the support of an infidel faction?" For the Prelates of the Church of England as a body I entertain the most profound respect and veneration, but I do deplore, that sentiments such as these should be uttered by one of

them on an occasion, when his clergy were assembled to receive from him instruction for their spiritual guidance, when there could be no contradiction or reply to his assertions, and when there might possibly be present, sincere and pious and praiseworthy christian ministers of different political principles. Honourable Gentlemen opposite I believe, will deplore with me that such sentiments should be expressed from the pulpit by an English Bishop, and should be afterwards published to the world under the sanction of his name. Let them not seek to fix upon us and to damage our cause by the extravagant opinions of all the enemies of establishments and all the contemners of lawful authority who may profess to support us.

I have now only to notice the topic of the Right Honourable Baronet, that we should reject this measure, from an apprehension of the censure of posterity, who, it is supposed, if we agreed to it, would reproach us for departing from the institutions of our ancestors, and changing the law for our own pecuniary gain. Nothing can be more fallacious than to trumpet forth the wisdom of our ancestors on such a subject; for, under the present circumstances of the country, our ancestors never would have laid the impost of Church-rates on the people. As I have already observed, when this impost originated, and for many ages afterwards, all the inhabitants of every parish were necessarily of the same religion, and worshipped God in the same edifice, under the ministrations of the same holy man. Church-rates therefore rested on the equitable maxim, that all shall contribute to that which is for the benefit of all. But by the permission of Divine Providence, there is now a great diversity of religious persuasions in this country, one of which, fortunately embracing the great majority of the population, is endowed by the State; but the others, with millions in their communion, having each separate places of worship, and separate religious instructors. And on what principle of justice can the members of the unendowed persuasions be required to furnish funds for that which is endowed? When a safe substitute is offered,—if Church-rates are still clung to, I cannot help suspecting, that they are held precious as a proof of the ascen-

dancy of the Church over the Dissenters. This suspicion is strengthened by the language of my Honourable and Learned Friend, who says the Church would no longer be national if Church-rates were abolished. So no church can be national unless it irritates and insults all who may differ from its doctrines. Are these the means by which a national Church is to be respected, is to be useful, is to be permanent? But, Sir, I have good hopes that the cause of Christian charity and meekness will triumph. No measure was ever so misrepresented as this. Such pains were never taken to poison the public mind as upon this occasion. But calumny will pass away, the voice of reason will be heard; and, although we have been held up to execration as Infidels or Atheists, I trust it will be found, that in bringing forward this measure we are the best friends of true religion, and that the Church flourishing through many ages, will long gratefully remember the service we have now rendered her.

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[NOTE.—The Resolution was carried by a majority of 23; but the opposition to it was found to increase, and the measure was necessarily abandoned,—affording another illustration of the remark of Hume, that where religious feeling is mixed up with any question, the ordinary reasonings and motives of the human mind lose their force, and no one can foresee the result. I must deeply regret, that the opportunity which then existed of establishing harmony and concord upon this subject was lost. All the evils from the defective law of Church-rates, which I attempted to describe have continued in full force. No legal process has yet been discovered to enforce the making of a Church-rate. As the most plausible scheme sanctioned by a learned civilian in the course of this debate, the Churchwardens of the parish of Braintree of their own authority made a rate on the refusal of the vestry to make one; but this rate has been held to be invalid, by the unanimous decision of the Judges of the Court of Queen's Bench, and by the unanimous decision of all the other Judges in the Exchequer

Chamber. Thus parish churches are still in danger of falling to decay, and the squabbles between Churchmen and Dissenters about making a rate continue with unabated animosity,—while some individuals who have resisted the payment of a valid rate, have, when sent to gaol for their refusal, experienced a considerable share of public compassion, and the imprisonment of these candidates for martyrdom has brought odium on the Church.

But, though I regret the continued existence of Church-rates as detrimental to the cause of religion, and against the public good, I must own, that I feel less sympathy with the Dissenters in their complaint against this levy; for they by no means showed the same energy to get rid of it as the Church to support it. They strongly urged a measure for the abolition of Church-rates; they professed warmly to approve of the one brought forward, which was certainly highly favourable to them; but when the struggle came, they quailed, and left the Government without any adequate counterpoise to the enthusiastic opposition which the mistaken zeal of the Church called forth.

By the emancipation of the Dissenters from most of the grievances under which they laboured, perhaps some evil has been produced—to sober our joy at the improvement in their condition. The Test and Corporation Acts being repealed,—Dissenters being now eligible to all offices and employments,—being allowed to be married by their own pastors, in their own places of religious worship;—and the births, marriages, and deaths of Dissenters being now registered in the same manner as those of members of the Church of England,—there is happily little to distinguish them as to civil rights; and they are not united as in former times by the bond of common suffering and the effort for common relief. Let me respectfully express a hope, that in this improved state of things, they will not fall off from that attachment to liberty which distinguished their fathers, and which, under Divine Providence, was one great cause of the free constitution we now enjoy.

In the above speech, when I had occasion to allude to Lord Stanley, I did not mean to give him any offence, having always

professed and felt great respect for his character, as well as his talents. However, at the close of the debate on the following evening, he thought fit to make a strong attack upon me. This I answered in a Letter to his Lordship, which I think is worth preserving, as none of its positions have been yet contradicted by judicial decision; and, sooner or later, the question of the abolition of Church-rates must again be seriously entertained by the Legislature.

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## LETTER,

TO THE RIGHT HONOURABLE LORD STANLEY,  
M.P. FOR NORTH LANCASHIRE, ON THE LAW  
OF CHURCH RATES.

MY LORD,—As your Lordship was pleased at the close of the late debate in the House of Commons, respecting Church Rates, very peremptorily to deny the law which I had laid down, in supporting the motion of the Chancellor of the Exchequer, I feel called upon to justify my opinion by a calm reference to the authorities upon the subject. Let these be accurately and candidly examined, and I think your Lordship will be convinced that the language you employed was hasty, and that you were prompted by partizans who had viewed the question superficially, or with a prejudiced eye. This mode of discussing it, I conceive, will be more satisfactory than a legal controversy in the House of Commons, which would not admit of a full citation of acts of Parliament, or decisions, and could consist of little more than assertion and denial. The inquiry must necessarily be dull and tedious; but I trust that no one who has ventured to dispute the opinion I gave, will refuse to enter into it fully and fairly.

After what has happened I must anxiously take care that it be distinctly known what that opinion was. Be it remembered that I have never cast a doubt upon the legality of Church-rates, or disputed that if a Church-rate be regularly made by a majority of the parishioners, the payment of it may be lawfully enforced.

Church-rates are certainly not of the remote antiquity which has been supposed by some, and there can be no doubt that in this country,

all the expenses attending divine worship, were originally defrayed by the Church itself from a portion of the tithes. The *circesceat* or *Church shot* which King Canute ordered to be paid by the faithful, suggested to have meant Church-rates, consisted of the first-fruits of seed, rendered to the clergy yearly, on the feast of St. Martin; and had no more connection with the repairs of the Church, than alms for the plough, or tithe of animals born during the year, or Peter's pence, the payment of which he likewise enjoins.

Mr. Justice Blackstone says, "At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one for the use of the Bishop, another for maintaining the fabric of the Church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the Bishops became otherwise amply endowed they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest, and that the remainder might well be applied for the use of their own fraternities, (the endowment of which was considered to be a work of the most exalted piety,) *subject to the burthen of repairing the Church*, and providing for its constant supply."

So Lyndwood, Bishop of St. David's the highest authority on Ecclesiastical law who wrote in the 15th century, observes that, "By the *Common law*, the fabric or repair of the Church belongs to this day to the rector, according to the appointment and cure of the Bishop; since under him that fourth due to the fabric of the Church, has been transferred to the rector himself; so that he who has the fourth ought to repair the Church. So that, *at common law*, the laity may not be compelled to do this. But certainly by *custom* even the lay parishioners are compelled to this sort of repair, so that the lay people is compelled to observe this laudable custom." Const. Legatin. 113.

I might cite the epistle of Pope Gregory to Augustine the Monk, requiring a portion of the tithes to be set apart for the repair of churches—an act of the Witenagemot in 1014, prescribing that a third part of the tithe shall be appropriated for this purpose,—and various decrees of Councils in the 12th and 13th centuries to the same effect. But all the books of authority, lay and ecclesiastical, agree in the position that the burthen was at first laid and long continued upon the tithes.

Probably it was very gradually shifted to the parishioners, and their contributions to the expense were purely voluntary.

The custom growing, it was treated as an obligation, and enforced by ecclesiastical censures.



The courts of Common Law seem to have interposed for the protection of refractory parishioners, till the statute of *Circumspecte agatis*, 13 Ed. I., which is in the form of a letter from the King to his Common Law Judges, desiring them to use themselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them, if they hold plea in court christian of such things as are merely spiritual, as "*si prælatus puniat pro cimeterio non clauso, ecclesiâ discoopertâ, vel non decenter ornatâ*."

Lord Coke observes, "That some have said, that this was no statute, but made by the Prelates themselves, yet that it is an act of Parliament, &c."\*

In the printed rolls of Parliament, 25th Ed. 3. No. 62, it is called an Ordinance; but in the statute, 2 and 3 Ed. 5 c. 13 s. 15. it is expressly stiled a statute, and it must now clearly be taken to be the act of the whole legislature.

From the year 1285 therefore, the Bishops were authorized by ecclesiastical censures, to compel the parishioners to repair, and to provide ornaments for the Church.

However, traces of the continuance of the original obligation in particular places are to be found much later, and in a MS. treatise, entitled, "*The Tree of the Commonwealth*," written by Edward Dudley, Privy Councillor to Henry VII., to be found in the Harleian Collection, No. 2204, after enumerating the duties of the clergy, the author calls upon them to perform these duties in all points, "employing the profits and revenues of their benefices, as they by their own law are bound to do. It is, one part thereof for their own living in good household hospitality. The second in deeds of charity and alms to the poor folk, and specially within their diocese and cures, where they have their living, and the third part thereof for repairing and building of their churches and mansions."

The matter was still purely of ecclesiastical cognizance. It was regulated from time to time by canons and constitutions of Archbishops and Bishops, who ordained what the parishioners were to find at their own charge.

For example, by a Constitution of Archbishop Winchelsea:—

"The parishioners shall find at their own charge, these several things following: a legend, an antiphonar, a grail, a psalter, a troper, an ordinal, a missal, a manual, the principal vestment, with a chesible, a dalmatic, a tunic, with a coral cope, and all its appendages, a frontal for the great altar, with three towels, three surplices, one rochet, a

\* Inst. 2. 487.

cross for processions, cross for the dead, a censor, a lanthorn, an hand-bell to be carried before the body of Christ in the visitation of the sick, a pix for the body of Christ, a decent veil for lent, banners for the rogations, a vessel for the blessed waters, an osculatory, a candlestick for the taper at Easter, a font with a lock and key, the images in the church, the chief image in the chancel, the reparation of the body of the church within and without, as well in the images as in the glass windows, the reparation of books and vestments whenever they shall need.”\*

In Popish times there was probably little difficulty in raising the rate without any assistance from the secular courts. When the common law, by which the expense was to be paid out of the tithes, had been forgotten, there could be hardly any reluctance to contribute to a burthen from which all, being of the same religion, derived an equal benefit; and if any parish refused to make a Church-rate by a majority of the vestry, there was a certain remedy by placing the parish under an interdict, by which the parish church was shut up, the administration of the sacraments within the parish was forbidden, and if any parishioner died, he was to be buried without bell, book, or candle.

It is laid down by Lyndwood that this was the mode of proceeding, “that so the parishioners may be punished by the suspension or interdict of the place.”

The question will be, whether since the glorious Reformation, an interdict having happily become impossible, a new remedy can be supplied, and the law can be altered without the sanction of Parliament.

Before leaving this part of the subject, I must observe, that in England the Church-rate never was a charge upon the land; and in this respect as well as others it is clearly distinguishable from tithes, which can in no respect be considered a tax, or a render, or a payment by the occupier of the land of any thing that ever was his. In Jeffrey’s case (5 Lord Co. Rep. 66.) deciding that the occupier of lands in one parish, though he reside in another, is rateable to the repair of the church of the parish in which the lands lie, it was resolved that “the churchwardens and *greater part of the parishioners* met together, might make such a tax by their law, and that it don’t charge the land but the person in respect of the land for equality and indifferency;” and it was said, that “the reason why every parishioner is charged to the reparations of the church, and to provide convenient ornaments in it for the greater convenience and honour of divine service, is first for the spiri-

\* Lindw. 251.; 1 Burn. Ecc. Law, 375.

tual comfort which he has in hearing the word of God there for his instruction and the true way to heaven, in celebration of the sacraments, and in presenting to God their prayers, not only privately, but with the great congregation, to be thankful to God for all his benefits, and to desire of him all things necessary, in respect of which inestimable benefits he is chargeable to repair his own proper church in which he receives them."

In Burn's Ecclesiastical Law, vol. i. p. 384, we have —

"An order and a direction set down by Dr. King, Dr. Lewin, Dr. Lynsey, Dr. Hoane, Dr. Seveite, Dr. Steward, and other doctors of the civil law, to the number of thirteen in all, assembled together in the common dining hall of Doctors Commons in London, touching a course to be observed by the assessors in their taxations of the church and walls of the church-yard of Wrotham in Kent, and to be applied generally, upon occasions of like reparations, to all places in England whatsoever." By this—"Every inhabitant dwelling within the parish is to be charged *according to his ability*, whether in land, or living within the same parish or for his goods there; that is to say, for the best of them, but not for both.

From the difficulty in getting at the amount of personal property, the general practice has long been to confine the Church-rate as well as the Poor's-rate to real property; but there seems no doubt, that originally personal as well as real property was subject to both, and that both were meant to impose a tax upon the parishioners according to their substance and ability. So late as the year 1823, in the Poole case it was decided by the High Court of Delegates, that by custom a Church-rate may lawfully be assessed upon shipping and stock in trade.\*

This short sketch of the history and nature of Church Rates will assist us in solving the main question, whether there be now any compulsory means of raising money to repair the Church, if the parishioners refuse to make a rate for that purpose. If indeed the rate had been a charge upon the land, to which it has been subject from the earliest times, as affirmed by some to whom great reverence is due, there would be a strong probability that the Common law would afford a process for enforcing the obligation; but if the contribution was voluntary in its origin, and has always remained personal, and for many centuries no remedy was known except spiritual censures, an inference may be drawn that spiritual censures can alone be resorted to, unless where a statute can be produced giving a remedy by civil process.

\* Miller v. Bloomfield and Slade, 1 Ad. Eccl. Rep. 499. 2 Ad. Eccl. Rep. 30.

Now, what I maintained and do maintain is, that a legal Church Rate can only be made by a majority of the parishioners in vestry assembled; and that if they meet and refuse to make a rate, there are no means by which the rate can be raised.

This is a very unsatisfactory state of the law, and is one among many reasons why, for the peace of the Church and the benefit of religion, the law upon the subject should be altered, and that the expense of repairing the fabric of the Church, and providing for the decent celebration of divine worship, should be defrayed from another source.

It seems to be admitted on all hands, that in the first instance it is necessary to assemble the parishioners in vestry, and to propose to them to make a Church Rate,—when it must be put to the vote whether a Church Rate to a given amount shall be made or not. Let us suppose that they refuse to make any Church Rate. As the law now stands, what is to be done? I say nothing can be done. Your Lordship says, it shall not depend upon the caprice of a majority of the vestry to grant or to refuse.

I will examine in detail the different compulsory expedients which have been suggested.

That which I think has been most strongly relied upon is a mandamus by the Court of King's Bench to the churchwardens and parishioners to make a rate. And if there were a legal obligation upon them, I conceive that upon their refusal a mandamus would be granted as a matter of course. If there be a refusal to make a poor rate, or a highway rate, a mandamus immediately issues,—which would be followed by an attachment, or process of imprisonment against those who should disobey it.

The experiment of a mandamus to compel the making of a Church Rate has been tried more than once, and has as often failed.

In the year 1793, when Lord Kenyon was Chief Justice of the Court of King's Bench, an application was made for a mandamus to the churchwardens of St. Peter's, Thetford, to make a rate for the repairs of the parish church. The counsel admitted, that in general the rate should be made by the churchwardens and inhabitants at a vestry, but said, that the former alone might make a Church-rate if the latter refused, and that the inhabitants had refused in this case.

The Court thought it so clear that they could not interfere by mandamus, that a rule to shew cause was refused.\*

In *Rex. v. Wilson and others*, decided in February 1825, when Lord Tenterden was Chief Justice of the King's Bench, a rule was obtained,

\* 5 Term, Rep. 364.

calling on the churchwardens of a parish in the county of Cambridge, to shew cause why a mandamus should not issue to them, commanding them to make a rate for the repairs of a donative church in that parish.

Sir James Scarlett, now Lord Abinger, Chief Baron of the Exchequer, shewed cause and objected preliminarily, that a mandamus would not lie to the churchwardens to make a rate. All that they could be required to do, was to call a meeting of the parishioners for the purpose of considering the propriety of making a rate. The churchwardens had no power to make a rate without the sanction of the vestry.

Mr. Denman, now Lord Denman, Chief Justice of the King's Bench, *contra*, admitted the force of the objection :

“ Per Curiam. You cannot call upon the churchwardens to make a rate. You can only call upon them to hold a vestry meeting for that purpose.” Rule discharged.\*

There may be a mandamus to raise a rate to pay a debt incurred under the Church Building Acts, marking the distinction that the one is obligatory, and the other is not. *Rex. v. Churchwardens of St. Mary, Lambeth.*†

This was an application for a mandamus to make a Church-rate to repay a debt contracted under the Church Building Acts, 58 Geo 3, c. 45, and 59 Geo. 3, c. 154, which enact, that it shall be lawful for the churchwardens, upon the application of the parishioners, to borrow money on the credit of the rates for the building of new churches, and in every such case to make rates for the payment of the interest of any monies advanced for the building any such church, and for providing a fund for repayment of the principal. It was submitted on the part of the churchwardens, that they could not, of their own authority, make a rate, and that the consent of the parishioners was necessary.

Lord Tenterden distinguished this case from the making of a common Church-rate, and held that by the statutes the churchwardens were authorised to make the rate of their own authority.

The same distinction was taken, and the same rule laid down in *Rex v. Churchwardens of Brighton* in Michaelmas term, 1836.

In *Rex v. Wix*,‡ a mandamus was granted to elect churchwardens, that they might exercise the powers which lawfully belong to churchwardens, but no hint is thrown out that they could make a Church-rate without the vestry.

In *Rex v. Churchwardens and Overseers of the poor of St. Margaret*

\* Dowling and Ryland's Reports, vol. 5, p. 602.

† 3 Barn. & Ad. 651.

‡ 2 Barn. & Ad. 197.

and St. John, Westminster,\* the Court granted a mandamus to assemble a meeting to consider of a Church-rate, but expressly said they would not interfere by mandamus to compel the making of a Church-rate; and they would only command them "to assemble, in order to inquire whether it be fit that a rate should be made."

The last case is particularly strong to shew, that as far as the common law is concerned, the making of a rate is an act in the discretion of the vestry, as the parishioners were ordered to meet and to consider of it;—just as a mandamus will be granted to Quarter Sessions to hear an appeal; but wherever the decision is in the discretion of the parties to whom the mandamus is directed,—when they have deliberated, the power of the superior court is at an end, and the refusal to interfere farther proves the act to be discretionary.

I hope, that after these authorities your Lordship will no longer insist upon the remedy, by mandamus, from whatever quarter it may be recommended.

Can any thing more be done in the Courts of Common Law? Will an indictment lie against the inhabitants of a parish for not repairing a church, as against the inhabitants of a parish for not repairing a highway, or against the inhabitants of a county for not repairing a public bridge? If the repair of the church were a common law liability, like the repair of a highway or a bridge, I have no difficulty in saying that it might be enforced by indictment; but there is no precedent for such a proceeding, and I believe no lawyer will say that it could be adopted.

As there is no remedy at law, can equity give relief? None. No ingenuity could make this out to be a case of trust, or could find the proper parties to the bill.

The only recourse then is to the Ecclesiastical Courts. A valid rate they can enforce; but without a valid rate they are now powerless. The churchwardens may be cited; and if they had funds in hand they might unquestionably be compelled to repair the church. It seems to me equally clear, that on shewing that they have no funds in hand, and that a rate has been refused by the vestry, they must immediately be absolved. I shall prove, by and by, that they are not bound to lay out money, or to incur personal responsibility without a rate having been previously laid on to reimburse them, and that to repay a debt already incurred, a rate cannot lawfully be laid on, even by a majority of the vestry. Therefore, if the Ecclesiastical Court were to take any proceedings against churchwardens who have no funds, and who, having

\* 4 Maule & Sel. 230.

done their best, can obtain none, a prohibition to stay the proceedings would be immediately granted. *A fortiori*, nothing can be done against an individual parishioner, who is not an officer, by monition or otherwise. It has not been suggested, that the majority who refused the rate may be excommunicated for that act. The interdict is gone, and it is replaced by no substitute.

There being no remedy in any Court, civil or criminal, lay or ecclesiastical, without a valid rate, the only question remaining is, whether a valid rate can be made without the consent of a majority of the vestry.

In the difficulty that has been occasionally experienced upon the subject ever since the Reformation, on a refusal by the parish, attempts have been hazarded to make a rate by the Ecclesiastical Court, or by commissioners appointed for that purpose by the Bishops. These have been held to be illegal, and I apprehend will never be repeated. In the case of *St. Mary Magdalen, Bermondsey*,\* it was the opinion of the whole Court (among other things), that the Bishop or his Chancellor cannot set a rate upon a parish, but it must be done by the parishioners themselves; and so North, C. J., said that it had been lately ruled in the Common Pleas.

In *Black v. Newcomb*,† it was decided that the Ecclesiastical Court cannot make a rate, or appoint commissioners to do it.

So in *Rogers v. Davenant*,‡ 26, and 27, Car. 2. “In prohibition the question was, whether, if a church be out of repair, or so much out of order, that it must be re-edified, the Bishop of the diocese may direct a commission to empower commissioners to tax and rate every parishioner for the re-edifying thereof.

“The Court unanimously agreed that such commissions are against law, and therefore granted a prohibition to the Spiritual Court to stop a suit there commenced against some of the parishioners of White-chapel for not paying the tax according to their proportions.”

The last expedient is to contend, that if the parishioners refuse a rate, the churchwardens may, of their own authority, make a valid rate in spite of them.

I must first observe, that this would be a very strange law, as it entirely annihilates the power and control which the parishioners have immemorially exercised over the rate. If the churchwardens have the power, they must be allowed to judge of the quantum of the rate, as well as the necessity for it, and the assembling of a vestry to consider of a rate would, in every instance, be a mere mockery. The

\* 2 Mod. 222.

† 12 Mod. 327.

‡ 2 Mod. 8.

privilege of the parish in this respect would be such as would belong to the House of Commons, if, upon their refusal to grant a supply, or such a supply as the minister requires, a tax to raise the amount might be imposed by the king's proclamation.

I may further observe, that if there were such a law, it would be well known,—it would be laid down in all the books upon the subject—and having the merit of being very simple and efficacious, it would be constantly acted upon where a rate is refused by the vestry.

But it is not to be found in any book that treats professedly of Church-rates, or the practice of the Ecclesiastical Courts.

In *Degges Parsons Councillor part 1, c. 12*, the author, with some hesitation, says, he conceives that if the parishioners refuse or neglect to join in making an assessment, the churchwardens having just cause for such assessment may proceed alone, they being liable to ecclesiastical censures for not repairing the church. He immediately adds, however, “But some are of opinion that the churchwardens cannot proceed alone, but must compel the parishioners to do it by ecclesiastical censures. *Ideo quære.*”

His only reason, the supposed liability of the churchwardens to punishment, for not repairing without funds, is now proved to be fallacious, and if he had been aware of this he would probably have agreed with those who, he observes, deny the power of the churchwardens to proceed alone, and he would not have considered the matter doubtful.

In Viner's Abridgment, and in Bacon's Abridgment, title “Churchwardens,” it is said that if the parishioners upon notice refuse to come, or being assembled, refuse to make any rate, the churchwardens may make one without their concurrence, on the ground that being liable to be punished in the Ecclesiastical Court for not repairing the church, it would be unreasonable that they should suffer by the wilfulness and obstinacy of others.

These two compilations, I apprehend, are of no authority, unless when they are supported by the decisions which they cite. The following is the only case referred to in support of this doctrine.—

“T. T. 35. Car. 2.—In Banco Regis,\* Anonymous.—A motion for a prohibition to a suit in the Ecclesiastical Court, for a churchwarden's rate, suggesting that they had pleaded that it was not made with the consent of the parishioners, and that the plea was refused.

The Court said that the churchwardens (if the parish were summoned and refused to meet and make a rate) might make one alone for the repairs of the church, if needful; because that, if the repairs were neg-

\* Ventris, 567,



lected, the churchwardens were to be cited, and not the parishioners ; and a day was given to shew cause why there should not be a prohibition."

Now, in this very loose report of this anonymous case, by an inaccurate reporter, there is only an *obiter dictum* as to the power of the churchwardens, which is contradicted by a rule to shew cause being granted why there should not be a prohibition, or in other words, why the rate should not be quashed as invalid ; and the reporter never states what was the judgment of the Court when cause was shewn.

I have, I believe, stated all that is in print, or that was at all known in Westminster Hall on this point, till, during the reply of the Chancellor of the Exchequer, a decision of Sir Wm. Wynne in the year 1799, was cited from a MS. note of Dr. Arnold, by Dr. Nicholl, M.P. for Cardiff. The case is *Gandern v. Selby*, and it was very accurately cited : but when examined it will be found entitled to no weight whatever ; and I apprehend it must have remained unpublished, like many other notes of erroneous decisions, because the publication of it would only introduce uncertainty and confusion into the law.

Selby, a churchwarden of Easton Mawdit, sued Gandern in the Ecclesiastical Court of Peterborough, for non-payment of Church-rate, and he alleged in his libel that the church being out of repair, and other things wanting, &c. ; the parishioners met and agreed on a Church-rate of 9½d. in the pound. The defendant pleaded amongst other things that the rate had not been obtained by the major part of the parishioners. It appeared by the evidence, that the parish church requiring some repairs, Selby, having no funds in hand, instead of calling a vestry, and making an estimate of the repairs, ordered such repairs as he thought necessary to be done on his own credit. He then called a vestry to make a rate to reimburse him, and asked a rate of 9½d. in the pound. The parishioners objected, that the repairs were not necessary, and that they had employed a mason to overlook them, who confirmed this statement. They offered a rate of 6d. in the pound, and refused more. Selby, then, by his own authority, made a rate of 9½d. in the pound for his own reimbursement.

Sir W. Wynne, on appeal to the Court of Arches, is supposed to have held this rate to be valid, and to have condemned the appellant in costs.

Sir W. Wynne cites no authority whatever, and gives no reason, except that churchwardens may be proceeded against for not repairing, although they cannot get a rate, which is clearly a mistake, and that, as an interdict and other ecclesiastical censures are now unavailing, there is no other remedy.

Without any disrespect to the memory of Sir W. Wynne) I must be permitted to say, that if he so decided, he decided erroneously.

It seems strange, in the first place, that the plaintiff should have succeeded, when the material allegation of the libel had been denied and negatived by the evidence—that the 9½*d.* rate was made by a majority of the parishioners. Even if a rate made by churchwardens against the will of the parish be good, the truth ought to be stated in a proceeding to enforce it: but it might have been inconvenient to have stated the truth in the libel, as the want of jurisdiction would have appeared, and the proceeding would have been held null in a Court of Law after sentence. Next, we have the anomaly of one Churchwarden acting without any account of the other; and such an act by one of two churchwardens must be void. Then we have it laid down, that a churchwarden can make a rate for his own reimbursement, and that he is the sole judge of the sum required.

I will venture to say, that if Gandern had applied to the Court of King's Bench, or that, if the case had been brought by appeal before the Court of Delegates, the rate would have been held to be invalid. The objection that it was retrospective would alone have been fatal. It is now considered clear law, that a retrospective Church-rate is bad; and this goes to the very foundation of the supposed power of the churchwardens to make a rate against the will of the parish.

In *Rex v. Haworth*\* it was decided, upon the authority of several prior cases, that a rate to reimburse churchwardens such sums as they *had expended*, or might thereafter expend on the parish church is bad on the face of it, as in part retrospective.

Lord Ellenborough there says:—The regular way is for the churchwardens to raise the money before hand by a rate made in the regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time, on whom the burthen ought properly to fall. It will, indeed, sometimes happen, that more may be required to be expended at the time than the actual sum collected will cover; but still it is admitted that the inconvenience has been gotten rid of in such cases by an evasion; for the rate has been made in the common form, and when the churchwardens have collected the money, they have repaid themselves what they have disbursed for the parish. But we cannot now grant the mandamus to make a rate in the common form; for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the churchwardens of Bradford for money which they had expended,

\* 12 East, 556.

as well as for what they might expend; and the refusal of the defendants to make such a rate applies to the form of the demand; and we cannot now qualify their refusal. At present it appears, that the rate prayed for in this form would be bad, and therefore we cannot enforce it by mandamus." Per Curiam. Rule discharged.

The illegality of a retrospective Church-rate has likewise been decided in equity. In *Lanchester v. Thompson*,\* an attempt was tried to force the making of a Church-rate on the ground that the vestry had sanctioned the expense which the churchwarden had incurred. But Sir John Leach, M.R. said, "In the case before Lord Ellenborough it was established, that a Church-rate can be legally made for the reimbursement of no churchwarden, because that would shift the burden from the parishioners at the time to future parishioners. The law was the same with respect to the Poor-rate until a late statute. And although the Spiritual Court may compel a Church-rate for the purpose of repair, it must follow the law, and cannot compel a rate for reimbursement."

A question has been made, whether if the rate does not profess upon the face of it to be for a retrospective purpose, it can be invalidated on the ground, that in truth it was made either in whole or in part to defray a debt contracted by churchwardens; but in a late case in the Consistory Court of the Bishop of London, it was decided by the very learned Judge of that Court, that the evasion of making a rate professing to be prospective, but meant to be retrospective, cannot be tolerated, and that whatever the form of the rate may be, if the rate be really made to pay off a debt already contracted it is void.

The case was *Chesterton and Hutchins*,† respecting the legality of a Church-rate for the parish of Kensington, which appeared on the face of it in the usual form, but was made partly to cover a debt previously incurred by the churchwardens.

Dr. Lushington. "It is admitted that the rate is a retrospective rate, to the extent of more than one-third of the whole amount, though not on the face of it,—and the question I have to decide is, whether a rate, admitted to be retrospective to the extent which I have stated, can or cannot be enforced by the authority of this Court. Now, it is my duty, on the present occasion, to be entirely guided by the decisions which have previously taken place in courts which have had to consider this question; and if I see any reasonable doubt as to what the law is, I shall certainly deem it my duty to give the churchwardens the benefit of that doubt, and by admitting the allegation, leave the other party to

\* 5 Madd. 4.

† Decided April 28th 1836, not yet reported.

proceed as he may be advised. But if, on the other hand, the law is clear, and laid down by high authorities who have decided the point, I apprehend I am bound in duty to bow to those authorities, and to pronounce against the admission of this allegation. It is not disputed that a rate, which on the face of it is retrospective, is vicious, and that it is impossible that such rate can be enforced. Whatever decisions there may have been on the subject from early times down to a comparatively modern period, it has been since settled by repeated decisions in the Court of King's Bench and the Court of Chancery, that a Church-rate cannot be retrospective. A case occurred in the year 1770, in which the decision of Sir George Hay was apparently founded on a different principle. In that case, Sir George Hay rejected an allegation of a defendant resisting a Church-rate, on the ground that it was retrospective for one year; and thus the law stood in these courts till 1812, in which year my predecessor, Sir Christopher Robinson, in the Spitalfields case, held the same doctrine as Sir George Hay in 1770. But the parties in that case had so little hope of succeeding in a court of law, that they declined proceeding. Since then the decisions have been uniform, that a rate, which is on the face of it retrospective, cannot be enforced. But I am now to consider whether a rate, which is not on the face of it retrospective, but which is admitted to be intended to cover in part expenses previously incurred, is legal or not. Had these sums been of small amount I should have felt myself justified in leaving them entirely out of consideration; but in the present case it cannot be said that the sums admitted to be retrospective are trivial or unimportant. Now the case is this: I cannot say that any case has yet been decided which expressly and directly governs the present case; but I cannot on principle comprehend, that there is any real distinction between the case of a rate on the face of it retrospective, and a rate admitted to be intended to cover debts, or part of a debt, previously incurred. It appears to me to be a distinction without any foundation, and that the cases are without any real and essential difference. Can it be maintained that this court is bound to set aside a Church-rate where the party making it had avowed an illegal object on the face of it, and to give force and effect to a rate where the object, though not equally avowed, was equally clear and illegal? I am unable to see any such distinction, and I am very clearly of opinion, that if such distinction were attempted in a court of law it would not be admitted. For the consequence would be absurd; it would be in the power of any vestry, by shaping the heading of the rate, to suit their own purposes, to violate the law at their own pleasure, and to any extent. I think that all the principles laid down by the Court of King's

Bench, and by the Vice Chancellor, in the case of Lanchester against Thompson, are equally applicable to rates admitted and intended to be retrospective, and to those which are retrospective on the face of them." Rate adjudged to be illegal.

Finally, Sir W. Wynne's doctrine is completely demolished by a decision of the Court of Exchequer, in the time of that great Judge, Lord Lyndhurst. The case was *Northwaite v. Bennett*,\* in which Mr. Baron Bayley intimated a strong opinion that a churchwarden is not bound to do repairs to a church on credit; that it is his duty to take care that he has funds in hand, and to pay ready money; and that it would be a good answer for a churchwarden to a libel in the Spiritual Court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success.

Lord Lyndhurst—"No fund appeared to exist at the time out of which the repairs might be paid for. I question if a churchwarden is bound to incur responsibility by putting a church in repair, if the parish do not previously supply him with funds for that purpose."

I deem it unnecessary to take further notice of the decision of Sir W. Wynne, which I believe never was quoted in any Court, lay or ecclesiastical, and which has lain *in retentis* for a period of thirty-eight years. I may boldly ask, if this were law, would it not have been acted upon in some one of the many instances in which Church-rates have been refused of late years. The civilians, and the common lawyers, and equity lawyers, who have been consulted about the mode of dealing with an obstinate vestry, while they have suggested the possibility of succeeding by mandamus, or monition, or bill in equity, appear never to have thought of the plain, straight-forward course of the churchwardens making a rate by their own authority.

Let it not be supposed, that this has been prevented by that which, were there such a power upon a refusal by the vestry, would be a shallow device,—an adjournment for a twelvemonth. Such an adjournment, or any adjournment, with the intention of refusing, is the refusal of a rate, and would clearly admit the churchwardens to the exercise of any power which a refusal confers upon them.

But there is no ground for saying, that the authority of churchwardens in making a rate goes farther than this—that if a vestry is regularly called to make a rate, and none except the churchwardens attend, the churchwardens then constituting the vestry may make a rate; as I conceive, that they might do any other act competent to the vestry, of which they are members.

Lord Holt is said to have been of opinion. "that if there be public

\* 4 Tyrwhitt's Exch. Rep. 236.

notice given to the parishioners, and they will not come, the churchwardens may make a rate without them.”\*

I have no doubt that this opinion is sound, and that it is the only foundation for the notion, that the churchwardens can make a rate without the parishioners.

A more extensive power in the churchwardens was unknown to Lyndwood; and Gibson, elaborately defining the power of the churchwardens in making a rate, must be taken to deny it:—

“ Rates for the reparation of the Church are to be made by the churchwardens, together with the parishioners assembled upon public notice given in the church. And the major part of them that appear shall bind the parish: or, if none appear, the churchwardens alone may make the rate, because they, and not the parishioners, are to be cited and punished in default of repairs. But the Bishop cannot direct a commission to rate the parishioners, and appoint what each one shall pay. This must be done by the churchwardens and parishioners, and the Spiritual Court may inflict spiritual censures till they do.”

Upon a refusal, spiritual censures were considered the only remedy.

I will now cite some common law authorities, in which the power to make the rate was held to be in the majority of the parishioners, without any restriction, qualification, or exception.

“ *Pierce v. Prowse*, Salk. 165.—Churchwardens assessed a rate, for repairs of the Church, and after libelled against a parishioner for not paying it. *Et per cur.* being moved for a prohibition. The parishioners ought to assess the rate and not the churchwardens.”

“ S. C. 1. Lord Raymond, 59.—Mr. Pratt moved for a prohibition to the Consistory Court of the Bishop of Exeter, where his client was libelled against for a rate assessed by the churchwardens by custom, for the repair of the Church, as well the chancel as the nave of the church; and resolved, 1. That the parishioners, and not the churchwardens ought to assess the rate.—A prohibition was granted.”

In *Rogers v. Davenant*, as reported 2. Mod. 194.—“ Wyndham, Atkyns, and Ellis, Justices, accorded, the churchwardens cannot, none but a Parliament can, impose a tax, but the greater part of the parish can make a bye-law, and to this purpose they are a corporation.”

In a case reported, 1 Mod. 79, it is stated to have been decided that, “ the Spiritual Court cannot impose the payment of a rate made by churchwardens only.

“ Moved for a prohibition to the Spiritual Court. For that they sue

a parish, for not paying a rate made by the churchwardens only, whereas by the law the major part of the parish must join. **TWISDEN, Justice.**—Perhaps no more of the parish will come together. **COUNSEL.**—If that did appear it might be something.”

The very form in which a Church-rate is made appears to me clearly to shew that it is, and must be, the act of the majority of the parishioners taxing the parish.

The following is from Burn’s Ecclesiastical Law, and, I believe, is that which has been universally followed.

“ We, the *churchwardens and other parishioners* of the parish of \_\_\_\_\_ in the county \_\_\_\_\_ and diocese of \_\_\_\_\_, whose names are hereunto subscribed, do hereby this day of \_\_\_\_\_ in the year \_\_\_\_\_ at our vestry meeting for that purpose assembled, *rate and tax* all and every the inhabitants and parishioners aforesaid here undermentioned, for and towards the repairs of the said parish for this present year, the several sums following,—

			£	s.	d.
A. B.	..	..	1	2	0
C. D.	..	..	0	3	0
E. F.	..	..	0	2	6

And so on.

A. B.	}	<i>Churchwardens.</i>
C. D.		
E. F.	}	<i>Parishioners.”</i>
G. H.		
I. K.		
&c.		

I will now only refer your Lordship to the opinion of an eminent divine of the Church of England, a thorough Conservative, a determined opponent of the ministerial plan, the Honourable and Reverend A. P. Perceval, B.C.L., who has just published a very interesting pamphlet on the subject of Church-rates. Having stated, that the agreement to make a rate is a spiritual duty, and to which men are no otherwise bound than by those motives of conscience and religion to which alone the Spiritual Courts appeal; he says—

“ It is this which makes the marked difference between rates and tithes, which some persons, for purposes best known to themselves, seem anxious to confound. Rates up to this hour are a *voluntary contribution* on the part of a parish, to which, if they refuse, there is no earthly power to compel them. But tithes are a distinct property; the only thing voluntary here, is, whether a man will cultivate his land or not; if he does, one-tenth of the produce is not his but another’s, who may sell it to whom he pleases.”



I hope your Lordship may think that I have now vindicated the legal opinion which I gave in the House of Commons upon the subject of making a Church-rate, and that although I did not then cite legal authorities. I did not speak without book. If the legal argument which I have the honour to address to you admits of an answer, let it be answered, and impartial inquirers will decide between us. But I must insist upon the practical remedy being pointed out for levying the rate, upon the refusal of a rate by the vestry. Mere *dicta* as to the obligation upon the parish to repair will not invalidate my position.

I will not mix up this question with your charges against me as a politician farther than distinctly to deny them, and to express my readiness to refute them whenever you shall give me the opportunity. I must add, that in the speech to which you replied with so much warmth, I had no intention, as I could have no motive, wantonly to attack you. Till I heard your assertion of *consistency*, I own I was not aware that you meant to contend that having introduced the Irish Church Temporalities Bill and opposing a Bill for England on the same principle, you were to contend that you were *consistent*. I expected that your Lordship would say, that you had seen reason to change your opinion respecting such measures, and I am sure I should most willingly have given you credit for sincerity, for disinterestedness, for a high sense of honour, and a chivalrous devotion to what you considered the good of your country;—but when your present coadjutors taunted us with inconsistency in bringing forward this plan, there was surely nothing unfair in reminding the House that one of its most violent opponents was the author of a plan for abolishing Church-rates in Ireland, and providing a substitute, not only by allowing the lessees of Bishops' lands to acquire a permanent interest in them upon equitable terms, but by abolishing ten bishoprics, and imposing a tax on all ecclesiastical livings to boot. It may be easy to point out differences in the details of the two measures, which would be very fit subject of discussion in Committee; but does your Lordship believe that any unprejudiced persons will say, that all the objections to the principle of the English measure might not have been urged with greater force against the Irish. Hear what is said on this subject by the Honourable and Reverend Mr. Perceval:—

“But says Mr. Rice, why call it monstrous at all, when it is no more than we did to your Church in Ireland four years ago? 'Tis very true; but there is a saying of a wise man not wholly irrelevant to the point:—‘Bind not one sin upon another, for in one thou shalt not go unpunished.’ It is very true that in 1833 this nation did to the Church of Christ in Ireland even worse than it now meditates to do to it in



England.      \*      \*      \*      \*      \*      \*      \*

\*      \*      The year 1833 witnessed the spectacle of an ancient and independent Christian Church, teaching the way of God in truth, loyal and faithful to the civil government, in the midst of assaults from its enemies, being singled out by that same government as an object for insult, tyranny and sacrilege, to vent themselves upon ;—its apostolic government superseded by a new state commission ; the whole of its endowments transferred to that commission ; and ten of its bishoprics annihilated at one blow ; while almost the whole church and nation of England stood by in silence, and scarcely raised a voice against such revolting impiety.”—p. 46.

Mr. Perceval is consistent in denouncing the present plan ; so is Sir Robert Inglis ; so is Sir Robert Peel ; but Lord Stanley can only claim the merit of good intentions ; and methinks he might show a little more forbearance and a little more Christian charity towards those who still retain the opinions which he has seen reason to abandon.

Before I conclude, permit me, my Lord, very respectfully to ask your Lordship again to consider whether it may not be for the peace of the Church and the advantage of religion to accept the offer now made. Can the present system of Church-rates efficiently and beneficially continue ? Mr. Perceval says, in the publication to which I have before referred, that the existing state of the law has occasioned clamour and confusion throughout the kingdom,—that it has disturbed the peace of numberless parishes,—turned the temples of God into election booths,—and substituted the fiercest ebullitions of base party spirit for the solemn and holy devotion which befits Christian men when engaged in a subject so nearly affecting the honour of Almighty God, as the repairing and decently providing for his house of prayer.

These crying evils, I am afraid, are likely to be aggravated, and there is a danger that in many parishes the Church-rate, upon its present footing, may prove wholly inadequate to its purpose—that there may be no available fund for the repair of Churches—and that by opposing this measure the lamentable consequence may follow (which is falsely charged to be the wish of its promoters), that those venerable edifices, under which the ashes of our forefathers repose, and which are so closely connected with all the most solemn circumstances of our own earthly career, and with our eternal hope, may become a heap of ruins.

Your Lordship calls for a more stringent law to enforce the payment of Church-rates. Read the stringent code for the payment of Irish tithes, and remember how it has operated.

There is proposed a certain and safe substitute for Church-rates,

which, when the details of the measure are adjusted, may be applied without loss, and without injury to any one. Your Lordship asks, whether the new created fund belongs to the State or the Church? I might answer in the words of a distinguished Nobleman, "I say to the State;" but whether it belong to the State or the Church, *quacunque viâ data*, its destination is legitimate. If it belongs to the State, the State may apply it to a purpose beneficial to the community, and akin to the purpose for which the property was originally intended. If it belongs to the Church, it may be fairly applied to any ecclesiastical purpose; and surely it is an ecclesiastical purpose to repair the fabric of the house of God, and to provide for the decent celebration of religious worship, according to the rites and ceremonies of the established religion.

The most plausible objection to the plan certainly is, that the fund might be advantageously employed in augmenting small livings and extending religious instruction. I hope there may soon be a surplus applicable to this laudable object; but is it not true wisdom, before proceeding to new endowments to secure the efficiency of those which we already possess?

The men who say that church lands are for ever to continue to be held and let on their present footing, are not to be reasoned with. I will venture to say, that this is the worst species of tenure for all concerned that ever was invented. Copyhold with a fine, according to the improved value, is bad enough, and I have been encouraged by eminent men of all parties in the State in my efforts to improve it. But there the tenant is entitled *de jure* to a renewal from the lord on payment of his fine; whereas the church lessee has no right recognised at law or in equity after the expiration of his term, and the Bishop may, when he pleases, run his life against the lives in the lease, or exact what conditions he pleases for a renewal. The equitable enfranchisement of copyholds would be no injury to lords of manors; the enfranchisement of church lands would be no injury to the church—there being reserved to every dignitary and his successor the full amount of his present income upon security that can never fail.

The existing tenure produced comparatively little inconvenience in a rude state of agriculture, but is now becoming daily more injurious, when permanent improvements are taking place wherever there is a fair return for capital, and our rapidly growing population can only be supported by the increased produce of the soil.

I conceive that the great principle of legislation is to make laws harmonize with the altered circumstances of the times. Church-rates themselves when first submitted to, were not unequal or unjust. Would

the tax have been originally sanctioned, if, in the reign of Edward I., a large proportion of those who were to pay it had dissented from the established religion, and had been permitted to erect and to maintain places of religious worship of their own? In the present state of society is it right, that no man, whatever his religious creed may be, can occupy a cottage, or a warehouse, or a shop, without being liable to be assessed to the Church-rate? It has been supposed that this liability is only incurred by choice, when a man purchases an estate; but, falling upon the occupier, no man in the realm, who cultivates a patch of land, or is in possession of any building for habitation or business, can avoid it.

Sir Robert Peel himself, although for different reasons, has pronounced the tax unequal and unjust. Is there any chance then of its continuing much longer?

If I have in any degree succeeded in shewing to your Lordship, that it partakes of the voluntary principle (which I agree with you cannot be relied upon for supplying adequate religious instruction to the population of this country), I may have induced your Lordship to regard more favourably a certain, fixed, permanent, legal provision by the State for the repair of religious edifices and the decent celebration of divine worship—not depending on “the caprice of the vestry” or the relative proportions of Churchmen and Dissenters in any parish.

I can only express my firm conviction, that if the commutation of tithes were followed up by this healing measure, finding a substitute for Church-rates,—the possibility of any collision between Churchmen and Dissenters being obviated,—all enmity to the Church would die away, and religious peace and concord would prevail throughout the land.

*Sed quis erit modus? aut quo nunc certamina tanta?  
Quin potius pacem æternam—  
Exercemus.*

I have the honour to be,

My Lord,

Your Lordship's obedient Servant,

J. CAMPBELL.

TEMPLE,  
March 31st, 1837.

# PARLIAMENTARY PRIVILEGE.

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STOCKDALE *v.* HANSARD,—Court of Queen's Bench.

## INTRODUCTION.

It was my intention to have given a detailed account of all the proceedings in the Court of Queen's Bench, and in Parliament, in the great struggle for Parliamentary Privilege, occasioned by Mr. Stockdale bringing actions for defamation against the Printer of the House of Commons, for the publication of papers ordered by them to be printed and sold for public information,—with a statement of the result,—and a view of what I now conceive to be the law upon the subject. But the case of *Howard v. Gossett*, the action brought by Mr. Stockdale's attorney against the Deputy Serjeant-at-arms for entering his house under the Speaker's warrant to arrest him, is still pending, and involves some questions, upon which, in the execution of this plan I must have expressed an opinion. Considering that such an expression of opinion would be indecorous during the pendency of the suit, I now confine myself to a mere mention of circumstances necessary to elucidate the following argument.

In the year 1835 the House of Commons came to a resolution, that the reports ordered by them to be printed should be openly sold by their printer at a fixed price, as their votes had long been,—

the reports theretofore, when not specially ordered by the House to be sold by a particular printer, being only accessible to the public through the favour of the Speaker, or a Member, or by irregular purchase from the door keepers. The object was to facilitate the circulation of useful information, and to lessen the charge on the public revenue.

A Report presented under an Act of Parliament by the Inspectors of Prisons respecting the abuses in the gaol of Newgate, stated that a book alleged to be obscene, published by Mr. Stockdale, was allowed to be read by the prisoners. This report being ordered by the House to be printed, Mr. Stockdale purchased a copy of it, and brought an action against the printer for a libel. In that action the defendant, in addition to the plea of *Not Guilty*, pleaded a justification,—that the book was obscene,—and on this last plea obtained a verdict.

The Court of Aldermen of the city of London having presented an answer to the Report of the Inspectors, this was followed by a reply from the Inspectors, which reiterated the charge respecting the book ;—and this reply being ordered by the House to be printed, Mr. Stockdale purchased a copy of it, and brought a similar action.

These matters being laid before the House of Commons, they came to a resolution that the Attorney-general should cause an appearance to be entered, and should defend the action. In consequence, a plea of justification was filed, averring in substance, that the paper complained of was printed and published by authority of the House of Commons, and therefore could not be treated as a libel. To this plea the plaintiff demurred.

There was a joinder in demurrer in July, 1837 ;—but luckily for me the argument did not come on till 23rd of April, 1839,—so that I had two long vacations to prepare for it.

On that day Mr. Curwood appeared for the plaintiff, and contended that the plea was no answer to the action, as the Court had jurisdiction to inquire whether the privilege asserted by the House existed,—and the House had no such privilege,—concluding with an apology on account of his being afflicted with blindness.

## SIR JOHN CAMPBELL, ATTORNEY-GENERAL.

My Lords,—My Learned Friend who has concluded with an affecting appeal to your Lordships' sympathy, began by stating how anxious he was in approaching such a subject. What then must be my anxiety? He represents an individual who (without looking out of this record to examine his character or his history) may safely be pronounced to have no object in bringing the present action, except to gratify a morbid love of notoriety. Were he to succeed in obtaining your Lordships' judgment,—from no rational and honest Jury could he expect more than nominal damages,—and considering that he sues in *forma pauperis*, costs even must be of small importance to him in the event either of success or failure.

Importance of  
question to House  
of Commons and  
public.

My Lords, I represent here the House of Commons of the United Kingdom,—who are called before an inferior tribunal for doing that which they thought was essential to the discharge of their legislative functions,—for exercising a privilege which they have enjoyed from ancient times,—long before the Revolution,—a privilege which is recognized by the Bill of Rights,—and which since the Revolution has never been questioned by any one but Mr. Stockdale. The Commons stand upon their defence for having made public a flagrant abuse in the management of gaols, by which imprisonment under legal sentence leads to the corruption instead of the improvement of morals,—an abuse requiring a legislative remedy, for which the public mind ought to be prepared by previous information. The representatives of the people are called upon to repel an alleged presumption of malice, and to shew, that in communicating with their constituents they are not liable to be treated as libellers and slanderers. The House of Commons representing the third estate in the realm, having, with the Lords and the Queen, supreme legislative authority,—having by their own peculiar power a right to in-

quire into the administration of justice, and to animadvert upon the misconduct of Judges,—are called upon before a tribunal subject to their superintendence and control, to discuss the extent and limits of their powers,—and to answer as criminals at your bar. The question is no less than whether they possess a privilege which they have solemnly adjudged to be essential,—and which is essential—to the due performance of their legislative and inquisitorial functions.

My deep sense of the importance of this inquiry to the public would unfit me for the task imposed upon me, were it not for my implicit reliance upon your Lordships. It is now (as far as the judgment of this court has any authority) to be decided, whether, with a view to the making of good laws, there shall be a free circulation of knowledge in this country,—whether the representatives of the people may with impunity make known information of importance to the safety and welfare of the state.

We are not now considering any personal immunity claimed by Members of the House of Commons. This is not a question respecting their exemption from arrest for debt,—or whether they are liable to be sued when Parliament is sitting,—or whether their goods are privileged from execution,—or respecting any private advantage which may arise to them. All Parliamentary privileges no doubt are conferred by the constitution that Parliament may freely and effectually do its duty; but it is apparent, that from the privilege now called in question, no individual Member of the House of Commons can incidentally derive the smallest benefit. It is claimed and asserted purely and exclusively for the public good. The House of Commons have long perceived, that they could not properly legislate or inquire without from time to time communicating to the public the information which they have collected, and on which they proceed. This is not a country in which it can be constitutionally said, that the people have nothing to do with the laws, but to obey them. The grounds on which laws

Members of the House of Commons no individual interest in the question.

are framed, must be understood,—must be approved of,—that the laws may be respected and obeyed.

To this privilege of free publication is applicable in a peculiar manner, the language employed in the address of both Houses of Parliament to the throne in the time of Charles I.

“ The rights and privileges of Parliament are the birth-right and inheritance, not only of Parliament itself but of the whole kingdom, wherein every one of your Majesty’s subjects is entitled. The maintenance and preservation thereof does very highly conduce to the public peace and prosperity of your Majesty and all your people.”

Address by both Houses of Parliament, temp. C. 1. 2 Parl. Hist. 978.

My Lords, my anxiety upon this subject is greatly encreased by considering the responsibility which I have incurred by the course I have adopted in defending this action. The House of Commons have most undoubtedly instructed me to appear to it,—but without meaning to submit their privileges to any other tribunal than the House of Commons.

They still claim to be the sole and exclusive judges of their own privileges ; but they have thought, that your Lordships should be informed in the manner I should judge most expedient and becoming, that the act complained of was done by their command and their authority—in the exercise of a privilege which they assert. If there were anything inconsistent in the plea pleaded and the claim of the Com-

Mode of proceedings.

Plea does not submit this question of the existence of the privilege to the Court.

mons to be judges of their own privileges, the fault would rest entirely with myself. But my Lords, when I have appeared in the names of those against whom the action is ostensibly brought, and pleaded in bar that the act was done by the command and authority of the House in the exercise of privilege—the facts alleged being admitted by the demurrer,—I conceive that it only remains for the Court to give judgment for the Defendants, and that you can as little inquire into the existence of the privilege, as upon a return to a habeas corpus setting out a commitment for contempt by either House of Parliament, you could inquire into the con-



tempt,—instead of immediately remanding the prisoner. The distinction between submitting the question of the existence of the privilege to legal decision, and asserting, as a bar to the action, that the act complained of was done in the exercise of privilege is clear and palpable. A confusion on the subject can only arise in minds so little imbued with legal principles, as to suppose that publishing a criminary paper gratuitously may be innocent, but becomes penal, where payment of a part of the expense of printing is required, with a view to prevent wasteful circulation. My Lords, no one can confound this distinction, unless an enemy to all privilege,—prepared (if such there be) to maintain that no argument can be advanced in favour of privilege which would not equally well show, that Members of the House of Commons have a right to rob and murder on the highway.

According to various precedents in both Houses of Parliament,  
 a different course might have been pursued, and summary proceedings might have been instituted against the party bringing an action for the purpose of calling in question the privileges of the House of Commons. Nay, such summary proceedings would have been justified by what has often been done by the Court of Chancery and other Courts in Westminster Hall. I have, however, thought it, under all the circumstances, the more expedient course not to seek to stop this action by any extraordinary exercise of power, but undoubtingly to anticipate, that your Lordships will be guided by the example of your predecessors, and pronounce judgment that no such action can be maintained. My desire is, as long as possible, to allow justice to proceed in its usual course, and, instead of apprehending any danger to privilege from any usurpation of authority, to place confidence in the constituted tribunals of the country.

There is likewise this advantage in the present mode of proceeding, that it not only gives the plaintiff the opportunity of denying the fact, that the party complained against had authority from the House of Commons, but to plead that there was an abuse of that authority by those to whom the execution of it has been

intrusted—so that the command being lawful, he may be recompensed in damages by a jury if its just limits have been exceeded.

For these reasons, I concurred in the opinion that it was the preferable course to enter an appearance to this action, and to state on the record the authority under which the act complained of was done. The nature of the defence being disclosed, your Lordships will say, that by the law and constitution of this kingdom you are incompetent to inquire into the existence of the privilege claimed ;—and if you could inquire, you would have no difficulty in coming to the conclusion that the privilege exists.

My Lords, the two Houses of Parliament have no reason to distrust the Judges of the common law. Formerly, while the Judges were the dependent creatures of the Sovereign, they were often opposed to the rights of the people ; but since they were happily made independent, they have steadily kept within the bounds of their proper jurisdiction and supported the privileges of Parliament,—equally disregarding the favour of the Crown and despising to court a short lived popularity.

My Lords, in the face of this Court and of the country, I respectfully repeat the protest, that the Houses of Parliament are by the law of England the sole judges of their own privileges, and that no action can be maintained for an act authorized by them in the exercise of privilege.

I may humbly observe, my Lords, that I have directed to this subject a degree of labour and pains adequate to its great importance. Without laborious and painful investigation, I will venture to say, that no advocate in a case like this can do justice to his clients, or render to the Court that assistance which may be fairly expected from the bar. I would beg leave, very respectfully to add, that without long inquiry and cool deliberation, it would be impossible for any Judge to come to a satisfactory conclusion on such a subject, or to express an opinion entitled to much weight.

I am still afraid that both authorities and arguments which might

have strengthened my case may have been overlooked by me ;—but I shall now proceed with all the brevity which the fair discharge of my duty will allow, to lay before your Lordships the result of the research of many weeks which I have willingly devoted to this inquiry,—animated by the conviction that I was assisting to establish truth and to support the free constitution of my country.

Now, my Lords, this case coming on upon demurrer, in order to see what points of law arise, of course we are to examine the record.

State of the Record.

We have a declaration in case for a libel. The declaration I have no hesitation in admitting is good upon the face of it.

Declaration.

It sets out a publication, which, if issued to the world without authority, would give to the Plaintiff a just cause of action ; it imputes to the Plaintiff that he had published an obscene book, which was found in the hands of the criminals confined in Newgate.

But, my Lords, when I admit that this is a criminatory publication, I by no means admit that it is a libel. A libel I

Definition of Libel.

apprehend to be a criminatory writing, published without just occasion or authority. My Lords, suppose that there had been an action brought for preparing an indictment, or for a report of either House of Parliament which had been confined to the use of the Members, or for a letter in answer to an inquiry respecting the character of a servant, I should be obliged to make the same admission ; because the declaration would disclose what is *prima facie* a good cause of action. But do I admit that an indictment is a libel ? or that a report confined to the use of the Members of the House of Commons is a libel ? or that an answer to an inquiry respecting the character of a servant is a libel ? No, my Lords, those are all acknowledged to be publications for just cause, and whatever loss they may occasion to the objects of them it is *damnum absque injuria*. There is crimination, but no libel ; and no action can be maintained by the party alleging himself to be defamed.

My Lords, I think I am entitled to complain of the ribaldry that has been resorted to upon this subject. We are told of a libel-shop

being opened by the House of Commons,—the persons who use that language not being able to apprehend the distinction between a criminatory publication under lawful authority, and that which without lawful authority is issued maliciously, and with the intention of defaming.

My Lords, to this declaration there is a plea, to the nature of which I must particularly ask your Lordships' attention. It is a plea *in bar*,—not to the jurisdiction,—and that I suppose some may say takes away from me the right to contend that this Court cannot judge of the existence of the Privilege claimed.

Your Lordships are well acquainted with the distinction between pleas to the jurisdiction and pleas in bar. There was a plea to the jurisdiction in the case of the *King v. Williams*, the authority of which Mr. Curwood surrenders, as it indeed was impossible for him to maintain it. He allows that the *King v. Williams* cannot be defended, and that it can only be accounted for from the disgraceful and factious spirit which prevailed at the time the decision was pronounced, and from the Judges being then the creatures of the Crown, and disgracefully prostituting their high and sacred office.

My Lords, the plea to the jurisdiction I apprehend is proper when the defence is, that there may be a just cause of action triable elsewhere; but that the action is not brought in the proper forum—that the suit is *alieni fori*; as if ejectment were brought in the Courts of Westminster for land held in ancient demesne. But, my Lords, where a Court has jurisdiction over the subject-matter disclosed in the declaration, though not to inquire into the authority on which the defence is founded, there, I apprehend, a plea in bar is the only plea that can be pleaded.

This doctrine was considered, and I think fully established, in the case of the *King v. Mr. Justice Johnson*. There it was laid down that a plea to the jurisdiction is bad unless the plea discloses another Court where the question is cognizable.

*Rex v. Johnson*,  
6 East 583.  
45 G. 3, A. D. 1805.

Effect of plea to  
jurisdiction.

Plea in bar.

My Lords, we do not say that there is another Court of Law where Mr. Stockdale might have redress for the injury inflicted upon him, but that he has no cause of complaint whatsoever—that no action can be maintained by him, and that this is a justifiable publication. The defence is, that the writing was published by the authority of the House of Commons in the exercise of an undoubted Privilege;—that it is a lawful publication,—and that there having been no wrong, there is no remedy.

But by this plea we do not at all admit that your Lordships can entertain the question of Privilege. This may be illustrated by similar actions, where the defence arises not upon the act of either House of Parliament, but upon the proceedings of a Court of Justice. Suppose, my Lords, that there were an action of trespass and false imprisonment in this Court, and that the Defendant justified, alleging that the Plaintiff was taken under a *capias ad satisfaciendum* upon a judgment of the Court of Common Pleas. This Court could not inquire as to whether that judgment was right or wrong. Suppose, my Lords, that the justification were under the sentence of a Criminal Court;—that the Plaintiff had been tried and convicted, and sentenced to imprisonment,—the propriety of that judgment could not be inquired into upon a de-

murrer to the plea. Then, my Lords, shall it be said that, upon such a justification, Privilege in every case is to be decided in a Court of Law?

Court no right to inquire into question of Privilege.

To that extent goes my learned friend, Mr. Curwood; he says that the times of ignorance and tyranny have passed away, during which alone was Privilege respected; and now every Privilege claimed by either House of Parliament is to be substituted to the consideration and the judgment of every Court of Law; because, of course, there is no distinction in this respect between the Court of Queen's Bench, I have the honour to address, and the County Court, or Hundred Court, or the lowest court in the kingdom. Well, then, my Lords, suppose that to an action of trespass and false imprisonment in this Court it were pleaded, by way of justification, that the Plaintiff being summoned to attend the bar of the House

of Commons did not attend, and therefore he was committed ; or that having attended he prevaricated, and, therefore, was committed ;—upon a demurrer to such a plea, would it be open to this Court to say that the House of Commons has no right to summon witnesses, or has no right to commit a witness for prevarication ? Suppose that a Member is committed for some outrage in the House—for words spoken in his place—I may even put a case, for assaulting the Speaker in the chair—he brings an action of trespass and false imprisonment—the commitment under the authority of the House is pleaded in bar to the action—which it must be, if the action is defended,—would it be competent to this court to consider whether the House has the Privilege to commit a Member for some outrage in the House—for words spoken in his place—for assaulting the Speaker in the chair ? Indeed, the present case, from the manner in which it has been argued, does assume a most fearful importance. According to the principle contended for, every Privilege of both Houses of Parliament may be questioned before the lowest tribunals of the country, and it will depend upon the opinion of an attorney's clerk, representing the Sheriff, or the steward of the Lord of a manor, what shall be the determination on the nicest and most important questions of Privilege.

Wherever the declaration discloses a good cause of action over which the Court has jurisdiction, there must be a plea in bar : but the defence pleaded may be of such a nature that upon demurrer admitting the facts alleged, there must instantly be judgment for the defendant. There cannot be a plea to the jurisdiction of the Court if the Court has jurisdiction over the grievance complained of. But the plea does not admit that the Court has jurisdiction to inquire into the matter pleaded in bar of the action.

Plea of Privilege  
in bar gives no  
such right.

Though it be necessary to plead to the action, and no plea can be pleaded to the jurisdiction of the Court, the plea may be a conclusive bar to the action, the Court having no jurisdiction to inquire into the merits of the justification relied upon. A proceeding may be stated in the plea which *de jure* is a bar to the action,

—which must be brought before the Court by plea—but into the regularity and propriety of which the Court cannot inquire.

Where an action like the present is brought, the Court is guilty of no excess of jurisdiction in requiring an answer, and if no answer were given, would be justified in pronouncing judgment for the plaintiff. The commencement of the action may be, and is, a breach of privilege by the party who commences it for the purpose of questioning the privileges of Parliament before an inferior tribunal ; but excess of jurisdiction on the part of your Lordships would only begin by inquiring whether Parliament has the privilege which it has claimed and exercised, and adjudged to be necessary for the due performance of its functions.

My Lords, when we plead in bar that this act was done by the authority and command of the House of Commons, we respectfully address your Lordships, informing you that it is authorized by the House, and was done in the exercise of privilege, and call upon you to give judgment for the defendants, without inquiring into the existence of that privilege.

This plea is perfectly consistent with the doctrine, that by the law of England the two Houses have the sole and exclusive jurisdiction to determine upon the existence and extent of their privileges. Just as a plea under a commitment by the Court of Common Pleas or Exchequer for a contempt, would be consistent with the doctrine that these Courts have the sole and exclusive jurisdiction to determine what shall be a contempt. This plea is likewise consistent with the doctrine, that for a Court of Law to decide upon matters of Privilege contrary to the law of Parliament as settled by the determination of the two Houses of Parliament would be erroneous, and a breach of the Privileges of Parliament.

My Learned Friend, my Lords, has alluded to certain resolutions of the House of Commons, as if they were intended to be in the smallest degree in derogation of the powers and authorities of Courts of Justice, or were at all inconsistent with the respect due

to Judges, which all good men must cherish. My Lords, these resolutions are levelled at the plaintiff, or any other individual who should dare to bring an action for the express purpose of upsetting and overruling the Privileges of the two Houses of Parliament,—but without the slightest intention of giving offence to any Court or any Judge; for the House of Commons have believed, and do believe, and I hope will have every reason to continue to believe, that all Courts and Judges in this country will confine themselves to their just jurisdiction, and that they will respect the subordination of the Courts of Justice to the Houses of Parliament which the Constitution has established.

Now, my Lords, it will be proper that I should draw your  
 attention to the facts that are alleged in the plea,  
 and which the demurrer admits. The plea first  
 refers to the Statute 5 and 6 William IV., chap.  
 38, sec. 7, by which inspectors of prisons are to  
 be appointed,—who are to make annual reports on the state of  
 prisons, and transmit them to the Secretary of State,—copies  
 of which are to be laid before both Houses of Parliament.  
 “Every such person so appointed shall, on or before the first  
 day of February in every year, make a separate and distinct  
 report in writing, of the state of every gaol, bridewell, house of  
 correction, penitentiary, prison, or other places of confinement  
 visited by him, and shall transmit the same to one of his Majesty’s  
 principal Secretaries of State, and a copy of every such Report  
 shall be laid before both Houses of Parliament within fourteen days  
 after such first day of February, if they shall be then assembled, or  
 if Parliament shall not be then assembled, within fourteen days  
 after the meeting thereof, after such first day of February.” It  
 was considered a matter of the greatest importance by the legis-  
 ture for the proper regulation of gaols, that not only should  
 inspectors be appointed, but that they should make reports to the  
 Government, and for the sake of publicity it was provided, that all  
 those reports should be regularly laid before both Houses of  
 Parliament. My Lords, the plea proceeds to allege, that Mr.

Facts alleged in  
 the plea. Statute  
 5 & 6, W. 4, c.  
 38.



Appointment of  
Inspectors.

Report to Secre-  
tary of State.

30 August, 1835.  
Resolution of  
House of Com-  
mons to publish  
Papers and Re-  
ports.

9 Feb., 1836.  
Appointment of  
Select Committee  
as to printing of  
papers.

18 March, 1836,  
Resolution to  
print and sell pa-  
pers, &c., and ap-  
pointment of  
Messrs. Hansard  
to conduct the  
sale.

Report of inspec-  
tors laid before  
House.

Ordered to be  
printed.

5 July, 1836, Re-  
port of Aldermen  
upon Inspectors'  
Report ordered to  
be laid before  
House; and to be  
printed.

Crawford and Mr. Russel were appointed inspectors of gaols, and that these gentlemen made a report of the state of Newgate to Lord John Russell, being then the Secretary of State for the Home Department. The plea then goes on to show the authority by which this Report was made public. It states on the 30th of August, 1835, there was a Resolution and Order of the House of Commons, "that the Parliamentary Papers and Reports printed for the use of the House, should be rendered accessible to the public by purchase, at the lowest price at which they could be furnished; and that a sufficient number of extra copies should be printed for that purpose." It then sets out, that, on the 9th day of February, 1836, it was ordered by the House, that, for effecting this object, "a Select Committee should be appointed to assist Mr. Speaker in all matters which related to the printing executed by order of the House." It then alleges, that a Select Committee was appointed; and that, on the 18th of March, 1836, there was a Resolution, "that the Parliamentary Papers and Reports, printed by order of the House, should be sold to the public at certain specified rates; and that Messrs. Hansard, the printers of the House, be appointed to conduct the sale thereof." The plea then states, that the Report of the Inspectors of Prisons was laid before the House by Lord John Russell, according to the Act; that there was an order by the House, that the Report should be printed; and that it was printed by the Defendants, the printers employed for the purpose by the House of Commons. The plea then sets out the order of the House of Commons, of the 5th of July, 1836, to lay before the House a copy of the Report of the Court of Aldermen, upon the Report of the Inspectors, and that such Report of the Court of Aldermen was laid

before the House, and was ordered to be printed. It then alleges that another Report of the Inspectors, by way of reply, was sent to Lord John Russell ; and that a copy of this reply was ordered by the House of Commons, to be laid before the House, and was laid before the House, in pursuance of that order ; and that this reply became and was part of the proceedings of the said Commons House of Parliament. It then goes on to allege, that it was ordered by the House, “ that the said reply of the Inspectors should be printed. Whereupon the Defendants so being such printers as aforesaid, and employed for that purpose, did, by the authority of the said Commons House of Parliament, and in pursuance of the said orders and resolutions of the said Commons House of Parliament, print the said reply of the said Inspectors of Prisons, as directed and required by the Orders and Resolutions of the said House, and did publish the same by the authority of the said Commons House of Parliament, and as directed and authorised by the said Orders and Resolutions.” It then negatives the publication on any other occasion, or in any other way, and concludes by setting out the Resolution of the House of Commons, “ whereby it was resolved, declared and adjudged, that the power of publishing such of its Reports, Votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it.”

Reply of Inspectors ordered to be laid before House.

Reply part of proceedings of the House.

Ordered to be printed.

Printed and published accordingly by the Defendants.

Resolution of House of Commons asserting the privilege to print and publish their proceedings.

To this plea, my Lords, there is a special demurrer—not for any informality ; for my learned friend, neither by his demurrer, nor in his address has pointed out any informality in the plea. The Demurrer admits, that the document had become part of the proceedings of the House of Commons, and was published by the authority of the House. The causes of

demurrer set forth consist of certain truisms, which of course I shall not dispute. “That the known and established laws of the land cannot be superseded, suspended nor altered, by any Resolution or Order of the House of Commons.”—Agreed.—“And that the House of Commons in Parliament assembled cannot by any Resolution or Order of themselves create any new Privilege to themselves inconsistent with the known laws of the land.”—Again I say agreed.—“And that if such power be assumed by them, there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm.”—Once more, agreed.

My Lords, I claim no power in the House of Commons to supersede, suspend, or alter, the law of the land; I claim no power in the House of Commons to create any new Privilege to themselves; although I do claim for them the power to declare what is the law of the land respecting Privilege,—which is part of the *lex terræ*. The House of Commons and the House of Lords are the proper tribunals to which the administration of that peculiar branch of the law is entrusted by the constitution; but in declaring what is Privilege, they have no right to alter the law of the land, any more than your Lordships, when a question of common law comes before you, being the tribunal which is the pure depository of the common law, and which is truly and impartially to administer it, have to alter the common law without being guilty of a great offence. My Lords, I do not say that the House of Commons can create any new Privilege of their own authority: that would be altering the law of the land. It is a power I disclaim. But to them is the power entrusted of saying what is the law of Parliament;—as it is entrusted to your Lordships to say what is the common law,—and an assumption of a greater power by either House of Parliament, or by the Courts of Law, would undoubtedly be dangerous to life, liberty, property, and character.

Now, my Lords, there being no informality pointed out in the plea, and that plea clearly showing that the act complained of was done by the authority and command of the House of Commons in

House of Commons do not claim power to create privilege.

the exercise of Privilege claimed by them, I have to submit to your Lordships that it is quite clear that upon this record the Defendants are entitled to judgment.

My Lords, I venture to lay down this as my first proposition, that the alleged grievance for which the action is brought, arising from an act of the House of Commons in the exercise of Privilege claimed by them,—the question of Privilege is raised *directly*, and this Court has no jurisdiction to inquire into the existence of the Privilege, and is bound to give judgment for the Defendants.

Points of argument. 1. That the question of Privilege arises *directly*, and therefore the Court has no jurisdiction.

Next, my Lords, if the question of Privilege were supposed to arise in this case *incidentally*, instead of *directly*, still I contend upon this record the Court cannot inquire into the existence of the Privilege, and is bound to give judgment for the Defendants.

2. That even if it arose *incidentally*, still the Court could not inquire into the existence of Privilege.

Then, my Lords, under a solemn protest that this question is not within your jurisdiction, I shall contend, if it were open to this Court to inquire into the existence of the Privilege—the Privilege does exist, and the Court is bound to give judgment for the Defendants.

3. (Under protest as to the jurisdiction of the Court) That the Privilege in question does exist.

My Lords, I think the most convenient course for me to adopt will be, in the first instance, without any particular reference to the authorities, to consider these two first propositions, upon general principles;—the authorities I will by-and-by bring minutely to your Lordships' attention.

Two first propositions considered on general principles.

Now, my Lords, there can be no doubt, and indeed I think Mr. Curwood admits it, that what is complained of here must be taken to have been done by the authority of the House of Commons, and that if the order of the House of Commons amounts to a justification, the action is barred. The record shows a general order

The publication is admitted to be by order of the House of Commons.

for printing and publishing for general circulation, which would include the Report and the Reply of the Inspectors ; and it makes no difference whether there be a general order comprehending the particular publication, or a particular order confined to that publication. There are various general orders which the House gives, and which are acted upon—there are the Sessional Orders, that all be taken into custody who are found in the avenues of the House obstructing the access of Members. If any person were taken into custody by the Serjeant-at-Arms under the authority of such a general order, the act would be done by the House of Commons, just as much as if there had been a vote that this individual by name should be committed to Newgate.

Then, my Lords, this is done by the House of Commons in the exercise of Privilege.

The word, *Privilege*, is applied to two matters which are very distinct from each other. There is, first, Privilege by which Members are exempt from arrest, and enjoy certain other personal immunities, formerly extending to their servants, till abrogated by Act of Parliament—not tacitly abandoned, as is ignorantly supposed by some.

There is another branch of Privilege which may more properly be called the power belonging to each House of Parliament as a body,—as the power to summon witnesses, the power to require the production of papers and records, the power to commit, the power to print for the use of the Members (which is not disputed), and the power to print any part of their proceedings for public information,—which I shall clearly establish. Now, my Lords, all these are considered within the general word, *Privilege*. It is in the latter sense that the power in question is to be considered Privilege,—being a power belonging to the House of Commons as a body. It is no personal immunity ; it is not the source of any benefit or advantage to any in-

No difference whether act done under general or particular order.

The word, Privilege, applied to two distinct matters.  
1. Individual Privilege.

2. Collective Privilege, or power of the House.

The Privilege claimed in this case is of the latter kind.

dividual Member ; but it is a power which is claimed by them for the public benefit. Still it ranges itself within the law of Privilege just as much as any personal exemption, being necessarily vested in the House for the effective discharge of its duties.

Lord C. J. *Denman*.—If I am not mistaken, the word *Privilege* does not occur in this record at all.

Mr. *Attorney General*.—No, my Lord, Privilege is not mentioned *eo nomine*. The plea sets out facts amounting to a legal defence. It was unnecessary to allege specifically that this was a Privilege ; it is shown to be a power exercised by the House,—just as in *Burdett v. Abbot*, where I believe the justification did not rely on the Privilege of Parliament by that name. When an act is justified under the authority of either House of Parliament, the word, Privilege, is not used. When it is shown to be the act of either House, the Courts of Law are satisfied. If there is a commitment—as in Lord Shaftesbury's case, and the case of the Queen *v. Patey*, and in Flower's case, and Sir John Hobhouse's case—the return to the *Habeas Corpus* does not make use of the word Privilege,—the return is only that it is the act of either House exercising a power which the House claims as belonging to it, and this being shown, immediately the party is remanded. And, my Lords, this power of publishing for the use of the Members, and publishing for the information of the constituent body, is just as much Privilege, if it does exist, as the power of summoning witnesses, the power of committing for prevarication, or any the most uncontested power belonging to either House of Parliament.

My Lords, this record is in the same state in point of law, and is to have the same effect as if there had been a formal order for the publication of the reply of the Inspectors, with a preamble stating, “Whereas it is the clear and ancient and undoubted Privilege of the Commons' House of Parliament to make public for the information of the constituent body whatever is thought necessary for the proper exercise of the legislative and inquisitorial functions of the House, and whereas it will be for the general benefit, and it is essential to the proper exercise of

Effect of the Record.

the legislative and inquisitorial functions of the House that the reply of the Inspectors of prisons should be printed and published, it is ordered that the same be printed and published in the exercise of the ancient, just and undoubted power and Privilege of the House.” My Lords, it must be taken that this act of which the Plaintiff complains, is the act of the House of Commons in the exercise of Privilege.

Then, my Lords, it is an act done by them within their general jurisdiction. It is not necessary for me to labour this point, because I apprehend that whatever act is done by either House of Parliament, when it comes to be considered in a Court of Law, must be supposed to be within the jurisdiction of the House, and every intendment is to be made in favour of it. But, my Lords, this act, in ordering the publication of this Report, was undoubtedly within the general jurisdiction of the House of Commons. It is admitted, that the House may lawfully and constitutionally print and publish their proceedings, so that they are not criminatory. This is alleged to have been printed and published by order of the House of Commons as part of their proceedings; the demurrer allows that it is part of their proceedings. Then, my Lords, it is not denied that either House of Parliament may print and publish whatever they please, even if it be criminatory, for the use of their Members,—though not for general circulation. I think I shall by-and-by shew satisfactorily that this distinction cannot be supported. But at present it is enough to shew *ex concessis* that the House of Commons has a general power to print and publish its proceedings. Now, supposing the power to be subject to certain qualifications, can a Court of Law inquire whether it has been duly exercised? Is there not a clear difference between a case like this and the case not very decently put, of the House of Commons, which possesses no jurisdiction to administer the criminal law of the country, making an order for the Serjeant-at-Arms to hang a man in the lobby for larceny?

My Lords, this publication is a proceeding of the House of Com-

Publication is an act of the House within its general jurisdiction.

Legality of Acts of either House of Parliament within general jurisdiction, cannot be inquired into in a Court of Law.

This publication  
is a proceeding of  
the House.

mons, and admitted to be so,—just as much as any examination at the bar of the House, or any report of a select committee. There might have been a committee appointed to inquire into the state of prisons, and the report of that committee to the House would have contained the examination of these Inspectors,—which, when adopted by the House, would have been beyond all question part of their proceedings. So, my Lords, these Inspectors might have been examined at the bar,—their examination might have been taken down and entered on the Journals, and published in the Votes. Where is the distinction between their examination and their report or reply—called for and ordered to be printed by the House? The report and reply must be supposed to have been read to the House, and may have been the subject of debate. These are proceedings of the House therefore as much as a bill read a first time and ordered to be printed,—or any of its resolutions or votes whether legislative or inquisitorial. Nor can any distinction for this purpose be taken between the report and the reply containing the alleged libel. The one was laid before the House under the special provisions of an Act of Parliament; the other by a vote of the House of Commons was laid before the House and ordered to be printed; it is alleged by the plea to be part of the proceedings of the House, and published by order of the House as part of its proceedings,—which the demurrer admits.

The question then arises, whether an action can be maintained against the defendants, as printers of the House, for this act by the authority of the House in publishing part of the proceedings of the House?

My Learned Friend must contend, that the Speaker who signed the order for publication would be liable,—that all the members of the committee who superintended the publication would be liable,—that all the Members of the House of Commons who concurred in the resolution would be liable. This in reality is an action for something done in Parliament. Therefore all these per-

No distinction as  
to liability be-  
tween the Speaker  
and the inferior  
officers of the  
House.



sons are exempt ;—but so are those acting under their authority. In Sir Francis Burdett's case no distinction was or could be made between the liability of the Speaker, and the Serjeant-at-arms. The same pleas were pleaded in the actions brought against them respectively, and the same line of argument was adopted. No one thought of suggesting, that if Mr. Colman had been guilty of no excess in executing the warrant, the action might have been maintained against him on the ground that the warrant was void, while Privilege protected Mr. Abbot who had signed it. You are to trace the act to its source. *Respondeat superior*. The agent who executes a void authority is answerable, but if the authority be void, the party who granted it cannot be exempt. The liability of the principal, therefore, may be a test as to the liability of the agent. Irrespective of Privilege, there can be no doubt that the Speaker and the Members of the House who concurred in the publication are liable ; for the act was by their authority. My Friend may say they are not liable, because it is an act done in Parliament. Then it is substantially for an act done in Parliament that the plaintiff sues ;—and the action cannot be maintained. This bears no resemblance to the case of an action against an officer for executing void process from a Court of Record, where he may be liable, though the Judges are not ; but is more like the case of an illegal warrant signed by magistrates, where the magistrates are liable, although the officer may be exempt.

But, my Lords, I respectfully submit that your Lordships have no right to inquire whether the House of Commons had the power

Two propositions.

1. This is a question of Privilege.

2. The question arises directly.

1. This is a question of Privilege.

to order the publication complained of, because 1st, this is a question of Privilege, and 2ndly, the question arises *directly* on the record.

(1) That it is a question of Privilege will hardly be disputed. Wherever the question is—whether

either House of Parliament has a power which it claims to exercise as a House of Parliament, this is a question of Privilege,—Privilege, as I have ventured to argue, not being confined to the personal immunity of the Members, but extending to all powers which belong to either House of Parliament as an aggregate body.

(2) My next position is, that the question of Privilege arises *directly* upon the record,—so that no court of justice has jurisdiction over it,—although if questions of Privilege arise *incidentally*, no act of either House of Parliament being in controversy, and neither House being in any way party to the proceedings,—Courts of Justice *ex necessitate rei* may be driven to consider them—in the same manner as they may consider questions of foreign law arising incidentally.

2. The question arises directly.

My learned friend relied upon the cases of *Donne v. Walsh*, *Benyon v. Evelyn*, and *Bernardiston v. Soame*, to establish your jurisdiction. The last was no question of Privilege whatever. It was there held in the court below, that an action could be maintained at common law for a double return against the returning officer—but the judgment was reversed on a writ of error. In the two other cases cited, a question of Privilege did arise, but it arose *incidentally* only—no act of the House of Commons being in controversy, and the House of Commons being in no way a party to the proceeding.

Cases cited by Plaintiff.

My friend has not cited and cannot cite, any case in which Courts of Law have taken cognizance of a question of Privilege arising *directly*, except the *King v. Williams*. There, indeed, the question of Privilege arising *directly*, as it does here, Chief Justice Herbert with the profligate Judges who assisted him, did take cognizance of the question of Privilege, and did overrule the privilege claimed. But my friend is ashamed of this decision, and eagerly renounces its authority—observing that it can only be accounted for from the badness of the times when all regard to decency was forgotten in Westminster Hall.

But my Lords, I shall adduce various instances to shew affirmatively that wherever the question of Privilege has arisen *directly*, Courts of Law have expressly declared they had no jurisdiction,—considering that the attempt was to appeal from the adjudication of a superior to an inferior Court, and to induce the Judges unnecessarily to inquire into the law of Parliament, of which the constitution supposes them to be ignorant.

Courts of Law no jurisdiction on the question of Privilege, where it arises directly.

The most common example is, where upon a commitment by either House of Parliament a *habeas corpus* is sued out. The return shewing the nature of the commitment, what have the Courts uniformly said, "Be the commitment right or wrong we have no jurisdiction. Here you can have no redress. Into this proceeding of a House of Parliament we cannot inquire." They have said that to avoid the danger of a conflict between the Houses of Parliament and the Courts of Law, the propriety of such a commitment cannot be examined, and that, as the question of the power of the House to commit, arose directly on an application to discharge a person committed by the House, they were bound instantly to remand. It is allowed on all hands that on a return to a *habeas corpus*, the question of Privilege arises directly, and the court has no jurisdiction.

So it arises directly where an action of trespass and false imprisonment is brought for a commitment by the House, and a justification is pleaded. Here the court has as little power to inquire into the merits of the commitment. Admitting that there is no power to discharge on *habeas corpus*, how can there be any power to hold that an action can be maintained for the imprisonment, whether you suppose the action to be brought during or after the imprisonment, or after or without an application to discharge on *habeas corpus*? The question would still be the same as on the return to the *habeas corpus*, and would be treated in the same manner.

You cannot say, that the question arises directly, only where the first complaint by the party alleging a grievance discloses the circumstances under which the act complained of was done, and shews that the alleged grievance was an act of either House. According to such a narrow and defective rule, the question would not arise directly on a *habeas corpus*, for the writ merely alleges an illegal imprisonment, and the authority does not appear till the return. The writ is analogous to the declaration—the return to the plea. Although the declaration does not use the word Privilege, nor show that any question of Privilege is likely to arise, but merely alleges that the defendant with force and arms assaulted and imprisoned

the plaintiff, if the plea justifies under the commitment by a House of Parliament,—upon a demurrer to the plea, the question surely arises directly whether the House has the power to commit.

My Lords, the question of Privilege arises directly where there is an act of either House done in the exercise of Privilege, which is sought to be overruled. Where you have either House substantially before you as a party,—where the act complained of is justified by the authority of the House,—the question whether the House has the power or Privilege which it has exercised, must be considered as arising directly.

Then does not the question of Privilege arise directly in this case as much as in an action of trespass with a justification under the authority of the House? This is not an action of trespass for an injury to the person of the plaintiff; but it is an action on the case for a supposed injury to his reputation, and the justification is under the authority of the House of Commons. The plea avers that the House of Commons committed the supposed grievance. How can the question as to any of the powers or privileges of the House of Commons arise more directly?

Suppose that instead of trespass and false imprisonment Sir F. Burdett had brought an action on the case (which he might as well have done), considering the warrant a libel, and declaring that Mr. Abbot, intending to defame him, had published a malicious libel, accusing him of having insulted the House of Commons. That would have been as good a cause of action as is disclosed by the present declaration, and a plea of justification would have been necessary under the vote of the House of Commons ordering Sir F. Burdett to be sent to the Tower under a warrant from the Speaker. The alleged libel was the warrant by which the vote of the House was to be carried into effect, and the power or Privilege of the House of Commons to commit one of its Members for a contempt, would have arisen as directly in an action on the case as it did arise in the action of trespass and false imprisonment actually brought.

Suppose an action of escape against the Sheriff, with the declaration in the usual form, and a plea that the party alleged to have

escaped, was, while in prison, elected a Member of the House of Commons, and was discharged by the Speaker's warrant issued according to a resolution of the House;—demurrer and joinder in demurrer. The Court would be called upon to determine that the House of Commons has a right to discharge from prison a person confined for debt who is elected a Member of the House. Although the declaration disclosed no question of Privilege, the question of Privilege would arise directly, as much as if the plaintiff had alleged in his declaration that the Sheriff unlawfully discharged the debtor when elected a Member of the House of Commons under a warrant from the Speaker, issued according to a resolution of the House,—with a demurrer to the declaration instead of a plea.

Test as to whether question of privileges arises directly or incidentally.

You therefore can never lay down the rule, that if the declaration merely discloses a common-law right of action which requires a plea in bar,—and a defence founded on Privilege is pleaded, the question of Privilege is to be taken as arising incidentally. If in the course of pleading before issue joined, it appears on the record that the action is brought to have an adjudication that an act of either House done in the exercise of Privilege was illegal, the question of Privilege arises directly, and the Court has no jurisdiction over it. It is *res judicata*, and no appeal lies to an inferior court. My friend talks of a wrong without a remedy; but he falls into the fallacy of supposing that the judgment of either House of Parliament in matter of Privilege can be considered as wrongful in a Court of Law.

Jurisdiction of Courts where question of privilege arises incidentally.

Where a question of Privilege arises *incidentally* in a Court of Law, and there has been no adjudication upon it by the proper tribunal, it may be necessary for the Judges to consider and decide the question,—resorting to the best means of information they can command. An action is brought for goods sold and delivered,—plea that Defendant is a Member of Parliament, and that a Member of Parliament is not liable to be sued for goods sold and delivered—*inde petit judicium*. On demurrer to the plea the question would

arise incidentally ; and, to prevent a failure of justice, it must be determined by the Court. When there is no act of the House of Commons complained of, when there is no adjudication of the House brought before the Court, and there is simply an allegation by a party sued for a debt that he is not liable to be sued—under such circumstances necessity requires that the question should be inquired into by the Court, and there is no other mode in which it possibly can be determined.

So it may happen as in *Benyon v. Evelyn*, that to deprive the Defendant of a just defence on the statute of limitations, the replication may allege, that having been a Member of the House of Commons he could not be sued when the cause of action accrued, and that he is still liable. There an attempt is made incidentally to thrust Privilege upon a man to his disadvantage, and he has a right to call upon the Court to decide that there is no such privilege.

Absurd consequences would follow, if in suits respecting the civil rights of two individuals on a mere allegation of the existence of privilege, without any adjudication of either House upon the subject being brought before the Judges, it were said they were bound to decide for it without inquiry. Necessity therefore may require that where a question of Privilege arises incidentally, the Courts should consider it : but necessity which gives, also limits and defines, the jurisdiction. In those cases only, where to prevent a failure of justice, the existence of the Privilege must be inquired into, is there any power to inquire into it. Where an act of either House in the exercise of Privilege is complained of, there is no such necessity. There it appears that the Privilege has been claimed and exercised and adjudged upon by the body to whom by the constitution the decision of the question is referred. If the House is supposed to have been mistaken, the remedy is to ask the House to reconsider its decision and to grant a recompense for any wrong which it may have committed. It may review and reverse its own decisions, although they are binding on Courts of Law.

But, my Lords, in the present case, were the distinction between

Even if question arises incidentally on this Record, Defendant entitled to judgment.

*direct* and *incidental* disregarded, I should equally be entitled to call upon you to give judgment for the Defendants without permitting yourselves to deliberate upon the existence of the privilege. Where

any question which properly belongs to a court of exclusive jurisdiction arises incidentally before another court even of equal or superior rank, the judgments of the Court of exclusive jurisdiction upon the question are conclusive. If a question of privilege which properly belongs to the two Houses of Parliament should incidentally arise before a Court of Law, that court must decide the question according to the Law as laid down in the Court of original and exclusive jurisdiction.

Exclusive jurisdiction of two Houses of Parliament.

Now, my Lords, I trust I shall have little difficulty in satisfying you that this exclusive right of judging of privilege does belong to the two Houses of Parliament. My Learned Friend would argue this question before your Lordships as if it were a question upon the

privilege of a witness to be exempt from arrest while attending under a subpoena, or of an attorney not to be arrested on mesne process, or of an officer of a Court in Westminster Hall not to be sued except in his own court. Over such questions, whether they arise directly or incidentally, Courts of Law undoubtedly have jurisdiction. These privileges are granted for the due administration of justice, and must be regulated by the Courts in which justice is administered. The constitution confers its privileges upon the House of Commons, that it may be independent of the Crown, that it may be independent of the House of Lords, and that it may efficiently exercise its legislative and inquisitorial functions. The exclusive power of deciding on these privileges by the House itself is indispensably necessary to their enjoyment. Privilege of Parliament supposes a power to be exercised by Parliament without the control or interference of others, faith being given that the power will not be abused, and that the remedy for any abuse will be found in Parliament itself.

Questions of Parliamentary Privilege are not to be decided by

Law of Parliament not part of common law, though part of *lex terræ*.

the law which this Court administers, but by another law which is administered by another Court of competent and exclusive jurisdiction. There is not only no necessity for your Lordships to give any opinion upon this question of Privilege ; but, with all deference and respect, you are incompetent to do so. The question depends upon the law of Parliament, which is different from the common law in which you were trained, and which you are sworn to administer. The law of Parliament is certainly part of the *lex terræ*. So is the ecclesiastical law ; so is the law which prevails in the Court of Admiralty. These are branches of the *lex terræ*, but they are not the common law. Equity, even, by which property is now regulated in this country much more than by the common law, is no part of the law to be administered in this Court ; and your Lordships sitting on that bench, are supposed to be entirely ignorant of its rules. No action can be maintained for a Breach of Trust, and your Lordships cannot look to any equitable doctrine. The *cestui que* trust, or person beneficially interested, has his remedy in the Court of Chancery ; but this Court is bound to regard only the legal estate, the incidents of which are governed by the rules of the common law. When that great equity lawyer, Lord Eldon, sat in the Court of Common Pleas, familiar as he was with every doctrine of equity, he was supposed only to know the common law, as Chief Justice ; and judicially, he must have professed ignorance of equity, as much as if he had never entered the Court of Chancery. What would it avail if I were to suppose that your Lordships as men of education and great general attainments, or having served in Parliament, are of the few to whom the law of Parliament is known ; and that it is as familiar to you as to Prynne or Hatsell. Still it is entirely different from the common law, by which your decisions are to be regulated. Your Lordships are aware, that it is not even necessarily part of the law of England, to which in point of territory your jurisdiction is exclusively confined. Parliament is now the Parliament of the United Kingdom, of England, Scotland, and Ireland, and various points



may arise in the law of Parliament, depending on the law and usages prevailing in the parliaments of Scotland and Ireland, while separate and independent kingdoms.

Your Lordships, the Judges of the Court of Queen's Bench in England, can as little take notice of the law of the Parliament of the United Kingdom, as the Judges of the Court of Session in Scotland. How are they to get at the law of Parliament? If an action of wrongous imprisonment were brought before the Court of Session, and there were a justification under the authority of either House of Parliament, that Court would no doubt consider the defence conclusive, without inquiring whether the privilege existed. So if the action were for defamation in respect of a publication in Scotland ordered by the House of Commons. They would say the question did not depend upon the law of Scotland, but was *alieni fori*.

The power of the House of Commons to direct this publication might even arise in the colonies, and in one of the colonies where foreign law,—Dutch, French, or Spanish—prevails. There might be an action brought in one of these colonies for this very publication, with a defence that it was printed and sold by order of the House of Commons. Could the Court in Guiana, or the Mauritius, or Trinidad, overrule the privilege? But in case of an unfavourable decision, you would appeal. To what tribunal? To the King in Council,—and the privileges of the House of Commons, would come to be decided by the Judicial Committee of the Privy Council, or such Privy Councillors as the Minister of the day, to answer a particular purpose might think proper to summon.

If you can decide upon the Privileges of the House of Commons, so may any hundred court or borough court in England;—so may any sheriff or baillie in Scotland;—and so may any colonial court in the empire—subject to an appeal to the Judges holding during the pleasure of the Crown.

Next, my Lords, I say, that the incompetency of this Court to decide a question of Privilege, where it arises directly, may be proved from the subordination of the Courts of Law to the Houses of Parliament.

The Courts of Law subordinate to the Houses of Parliament.

My Learned Friend, Mr. Curwood, has truly said, that formerly the Peers and Commons sat in one chamber and formed one deliberative assembly. The separation certainly did not take place till the latter end of the reign of Henry III. ; some say not even till the reign of Edward I. Well, then, my Lords, at that time the courts of justice were established ; they had the same powers which they now enjoy. When Parliament sat as one chamber, were not the Courts of Law subordinate to Parliament ? for not only was there a Writ of Error from the Courts of Law to Parliament, but the Courts of Law, it is well known, were in the habit of consulting Parliament before they decided upon any question of difficulty and importance that arose. Shall it be said, my Lords, that at that time of day, before the division of Parliament into two chambers, an act that was done by the whole Parliament might be reviewed by a Court of Law,—the appeal being from that Court of Law to the Parliament, and not from the Parliament to the Court of Law ? Would it not have been a gross absurdity to suppose that an act done by Parliament could be questioned in an inferior tribunal ?

Suppose, before that division, there had been a commitment by the Parliament, could the validity of that commitment have been inquired into by any Court of Law ? There being an adjudication by the Parliament that a particular act should be done, and an action being brought for that act, and it appearing upon the record that it was done by the authority of Parliament,—an appeal lying from the Court of Law to Parliament,—could a Court of Law have decided upon the legality of an adjudication by Parliament ? Suppose, my Lords, that before that division the Parliament had ordered that a particular paper should be published by being stuck upon the gate of Westminster Hall, and an action had been brought in a Court of Law treating the publication as a libel, and there had been a justification that the publication was by the authority of the whole Parliament sitting in one chamber, would it have been competent to a Court of Law to

Houses of Parliament formerly sat in one chamber.

Writs of Error lay to the whole Parliament.

If before the separation there had been a commitment or a publication by the Parliament, would it have been questionable in a Court of Law ?

decide that this was an usurpation on the part of Parliament, that the act was illegal, and that an action could be maintained against the officer of Parliament?

The division into two chambers occurred; but I venture to lay down this as a clear proposition, that after the division, which Lord Ellenborough has suggested must be supposed to have been by Act of Parliament, whatever either House of Parliament did in the exercise of their Privilege was the act of the whole Parliament, and had the same authority that would have been given to the act of the whole Parliament before the division.

After separation the acts of either House supposed to be the acts of the whole Parliament.

My Lords, acts of either House are still supposed to be done by the whole Parliament. The most familiar instance we have is a

Hale on the House of Lords, pp. 15, 128.

Writ of Error in Parliament. This is not a Writ of Error to the House of Lords—it is not an appeal from the Court of Chancery to the House of Lords—it is

a Writ of Error, or appeal to the Parliament; and the Commons, in point of law, are still supposed to form part of the appellate jurisdiction, and to concur in the judgment of the Lords. This subject is very minutely handled in Lord Hale's treatise upon the House of Lords, and in Mr. Hargrave's preface to that treatise; and there cannot be a doubt, that whatever is done by either House, since the separation, is still supposed to be done by Parliament. A commitment by the House of Commons, or a commitment by the House of Lords, has precisely the same authority that would have belonged to a commitment by the whole Parliament before the separation into two Houses.

Now, let me take an instance of an act, since the separation, done by the House of Lords. The House of Lords has still an appellate jurisdiction from this Court, and from all the Courts in Westminster Hall. Shall it be contended that your Lordships could decide that that which is done under the authority of the House of Lords is invalid,—your judgment being to be reviewed by that very tribunal whose act you seek to invalidate? Suppose an action had been brought by Lord Shaftesbury after his commitment by the

House of Lords, and there had been a justification under the authority of the House of Lords, and a demurrer to the plea—could you have entertained the question whether the House had the power to commit? There would have been a great difficulty in deciding that they had acted according to precedent, because it was the first commitment by the House of Lords, of which I am aware, brought before a Court of Law, and there had been no adjudication in Westminster Hall by which such authority was ascribed to the House of Lords. Suppose, instead of suing out a Writ of *habeas corpus*, he had brought his action for trespass and false imprisonment, would this Court have allowed the question to be entertained, whether the House of Lords had acted illegally in committing him to the Tower, when there would have been a Writ of Error to that very House of Lords whose judgment was to be overruled. Would not this be a clear inversion of the just order of things, and fatal to the subordination of tribunals which the Constitution has established? It would be, as I humbly conceive, a usurpation on the part of the inferior Court to take cognizance of the legality of the proceedings of the Superior Court. As far as the House of Lords is concerned, things remain precisely in the same state as that which existed before the separation of the two Houses of Parliament.

To illustrate the absurdity of this Court declaring illegal what is done by the House of Lords, let me put this example.

House of Lords have repeatedly ordered the publication of trials upon impeachment, or before Lord High Steward.

The House of Lords as your Lordships are well aware, have repeatedly ordered papers to be published. Upon every trial that has taken place for one hundred and fifty years, whether upon impeachment, or before the Lord High Steward, they have always ordered that a full account of the trial should be printed by a person named in the order. Now, it has been laid down by some of the Judges, that the publication of a trial is not necessarily and universally a lawful publication, and that if it reflects upon a particular individual, it may be made the subject of an action for libel. Then, my Lords, let me suppose that an action for libel is brought by a person who says he

is defamed by the account of the trial published by the authority of the House of Lords, and the defendant justifies, as is done here. The cases are quite parallel. He justifies under the authority of the House of Lords, who at the conclusion of the trial ordered this publication to issue for public information. There is a demurrer to that justification. The question then would arise directly, whether the House of Lords had authority to order such a publication, or whether their order was a justification to the party publishing? Would your Lordships take cognizance whether the House of Lords had authority to order this publication or not?

If action brought for a supposed libel, in such publication, this Court could not interpose.

Could you decide that an action would lie against the printer of the House of Lords? Would it not be enough for your Lordships to find that the order to print was the deliberate, solemn act of the tribunal to which your decisions are to be referred either for being reversed or affirmed? I apprehend that where any question of the legality of any act of the House of Lords arises, the House of Lords being the court of dernier ressort,—the tribunal possessing the highest judicial power in the realm,—it would be incompetent for any inferior tribunal to inquire whether the act of the highest tribunal was legal or illegal.

Now, my Lords, upon this subject, is it to be supposed that there is any distinction between the House of Commons and the House of Lords? Have not the House of Commons a co-ordinate and equal authority? It was once argued by Sir Robert Filmer, and others who agreed with him, that the House of Commons was a mere excrescence; that it existed by the pleasure of the King and the Lords; that whatever power was exercised by it might be considered as *octroyé* by the Crown; that it had no independent existence, and was hardly to be recognised as a part of the constitution. It would appear from the celebrated argument written by Sir Robert Atkyns, but not spoken, in the case of the King v. Williams, that those notions at that time of day were very prevalent; and your Lordships will find, upon referring to that argument, that a great

The House of Commons and the House of Lords co-ordinate and equal in authority.

part of it is occupied by showing that the House of Commons has an independent existence like the House of Lords—a co-ordinate authority, and independent Privileges ; and Sir Robert Atkins seems to have thought he had nearly reached the goal for which he was striving, when he had succeeded in establishing that proposition ;—presuming, that if the House of Commons was taken to be co-ordinate with the House of Lords, it was impossible to deny that the authority of the House of Commons in ordering the publication of Dangerfield's Narrative was a sufficient justification, and that the prosecution could not be supported.

Sir Robert Atkins' argument to this effect, in *Rex v. Williams*.

My Lords, I grieve to say there have been publications in the present day equally derogatory to the honor of the House of Commons and subversive of its just rights. My Learned Friend has introduced the name of a noble Lord, for whose talents and public services I feel the highest respect, but whose recent writings on the subject of privilege are entitled to no respect whatever and in the discharge of my public duty I must loudly condemn. Anonymous publications I cannot bring before your Lordships, but a publication ushered into the world by the Noble and Learned Lord himself, in his own name, discussing the subject of Privilege and professing to express the opinions of one who had held the highest judicial office in this country I have a right to make the subject of commentary and animadversion.

Improper publications pending this suit.  
Lord Brougham.

My Lords, considering that this distinguished individual is a Peer of Parliament—that he anticipates sitting as a Judge upon this very cause, now *sub judice*, I must deeply regret, that without hearing the arguments on either side, he should have prejudged it and published to the world sentiments which not only commit himself, but may have a tendency to influence and fetter the free judgment of others.

Lord Brougham in the late edition of his speeches, has republished his judgment in the case of *Wellesley v. Duke of Beaufort*, which was certainly well decided in accordance with the resolution of a

Committee of the House of Commons and in conformity to the law of Parliament, although there be some dicta in the judgment which were unnecessary and might be advantageously retrenched. But it is of the unjudicial preface written with reference to this pending cause that I complain. His Lordship is there pleased to say, amongst other things of the same sort, that “a new and extravagant claim has been asserted on behalf of the House of Commons to  
 4 vol. p. 341. publish libels through irresponsible agents.”

The publication is at once pronounced to be a libel. The right to publish the proceedings of the House, though of a criminatory nature, which has been exercised without question for two centuries, is declared to be *new*, and it is branded as *extravagant*, although without the exercise of this right, the Commons could not efficiently  
 Page 345. either make laws or inquire into abuses. Then his

Lordship is pleased to promulgate the doctrine which I might truly characterise as new and extravagant, that in respect to the privilege of guarding the personal liberty of its Members, there is no distinction between the House of Commons and the Bar, or of course, any other profession or trade. The Bar may inquire into the conduct of its Members, and ascertain whether they merit the treatment they receive,—and so may the House of Commons; “indeed there seems no conceivable reason why that body, (the bar) “should not also have common cause with the guilty party, so far at least as to inquire whether or not one of their Members was rightfully imprisoned, and thus suspended from the exercise of his functions.” The noble Judge goes on calmly and temperately

to say of those who are to argue the question before  
 Page 352. him,—“rights are now utterly disregarded by the advocates of privilege, excepting that of exposing their own short-sighted impolicy and thoughtless inconsistency; nor would there be any safety for the people under their guidance, if unhappily their powers of doing mischief bore any proportion to their disregard of what is politic and just.” But my alarm respecting the particular privilege in question is much quieted by finding, that in the opinion of the noble Lord, there is no privilege belonging to either

House of Parliament; and that all arguments in support of any privilege are to be scouted as preposterous. He adds, "Nor, it may be observed, is there a single argument ever urged in favour of privilege, which would not serve as a pretence for allowing all the Members of both Houses of Parliament to rob and murder with impunity on the highway." This is the language of one who anticipates giving an opinion upon this cause,—and uttered to the world when the cause is about to be argued and decided in this Court. None of your Lordships I should trust would voluntarily intrude upon the public with such a declaration of opinion; the other Judges of the land before whom the case might come on a writ of error in the Exchequer Chamber, have decently observed silence respecting the view they may be disposed to take of it; and surely all Members of the House of Peers,—more particularly those who have filled judicial situations, and may be expected to advise the House in giving judgement,—should have followed their example.

Such observations cannot possibly have any effect upon your Lordships, but they have a tendency to mislead the public, and to raise a strong prejudice against the proceedings of the House of Commons. I cannot but deeply lament the unfortunate situation in which the House is now placed, in being assailed by parties of the most opposite principles. There is not a doubt, my Lords, that much of the hostility displayed to the House of Commons in this conflict arises from its being a reformed House of Commons, freely elected by the people, and truly representing public opinion, and that many who now seek to degrade it would willingly have conceded to it all the Privileges it claims, had a majority of its Members been nominated by the proprietors of boroughs, and subject to their control. It is rather hard, that in vindicating the right to instruct the people, the House of Commons should be at the same time attacked by those who profess to be defenders of popular rights. But no combination of this sort can prevent the ultimate triumph of truth and justice.

Unnatural combination against the privileges of the House of Commons.



What is the body whose proceedings are to be treated with such levity? My Lords, the House of Commons represents the whole community of the realm, and the acts of the House of Commons are the acts of all the Commons of the United Kingdom,—of the whole mass of the population of all degrees and orders exclusive of the individuals who form the other House of Parliament. All are supposed to be present, and to concur in the vote of the majority. Their proper appellation is the Commons and not the House of Commons. Lord Holt says, “It is not to be doubted but that the Commons of England have a great and considerable right in the Government, and a share in the Legislature, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore, by the constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them.”

Power and importance of the House of Commons.

Lord Holt's opinion in *Ashby v. White*, 2 Ld. Raymond, 950.

The House of Commons, therefore, must be considered as the whole commonalty of the realm; and your Lordships may recollect that such is the language of the constitution from the earliest times.

By the statute of the 15th of Edward II. it is declared, “That matters which are to be established for the estate of our Lord the King, and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in Parliaments by our Lord the King, and by the assent of the Prelates, Earls, and Barons, *and the commonalty of the realm*, according as it hath been heretofore accustomed.”

Statute 15 Edw. 2, A. D. 1322.

The whole commonalty of the realm, virtually assembled, and forming the House of Commons, are entrusted with legislative power. Moreover, my Lords, they are the grand inquest of the nation. The House of Lords has authority to inquire, but, according to the constitution, a power rarely to be exercised, and only in

House of Commons the grand inquest of the nation.

default of the Commons doing their duty. It belongs especially to the House of Commons to superintend the administration of the laws, and to control the Courts of Justice. Whenever there is any corruption existing, or any oppression, it belongs to the House of Commons to inquire; it belongs to the House of Lords to judge: and the right to publish its proceedings is more particularly essential to the House of Commons in the exercise of its inquisitorial functions.

Right to publish essential to its inquisitorial functions.

My Lords, the House of Commons has the power of examining all judicial proceedings, and at the commencement of every Session there is appointed a Grand Committee of Justice, before which complaints are to be brought from every tribunal, high or low, in which law is administered within the limits of the jurisdiction of the House of Commons.

The House of Commons claims all the authorities of a Court. Whether it be a Court of Record has been questioned. Sir Edward Coke strenuously maintained, that it was a Court of Record, and uttered an imprecation against any person who should deny that position. But whether it be a Court of Record or not, it is utterly immaterial to any question in this cause. The Court of Chancery is no Court of Record, but it has not less the power of enforcing its own decisions. It is not in respect of its being a Court of Record, that this power of publishing what is necessary for the information of the public arises, but from its being one of the Houses of Parliament, and representing the commonalty, and from this power being necessary to the due exercise of its constitutional functions.

House of Commons has authority of a Court; immaterial whether it be a Court of Record.

Now, my Lords, it is laid down in "Comyn's Digest 'Parliament,' " (E. 14.) under the head "Committee for Justice." "A Committee for Justice may summon any Judges, and examine them in person, upon complaint of any misdemeanor in their office,"—"any Judges,"—the Judges of the land,—the King's Judges included. You have the authority of Chief

Committee of Justice in House of Commons may summon and examine Judges. Com. Dig. Parliament (E. 14).

Baron Comyn, that the Committee for Justice, appointed by the House of Commons, may summon any Judges, and examine them in person, upon complaint of any misdemeanor in their office.

My Lords, we have an instance of this given in first Siderfin, which occurred in the 19th of Charles II.: "Complaint was made against Kelyng, Chief Justice of the King's Bench, for misdemeanors done in his said office, such as fining of juries, &c., which were examined, and he appeared in person before the Committee, and also in the Commons House, and he was discharged."

C. J. Kelyng examined before Committee of Justice for misconduct, for which there was no redress at law.  
19 Ch. 2.  
A. D. 1667.  
1 Sid. 338.

This Judge, my Lords, was Chief Justice of this very Court, who certainly was an enemy to Privilege, and an enemy to the just liberties of the subject, and whose celebrated rhyme upon Magna Charta has been handed down to our times. No question, my Lords, was made as to the legality of summoning Chief Justice Kelyng before the Committee of Justice, and making him answer,—not respecting his decisions in point of law,—God forbid! if those had been erroneous, they were to be corrected on a writ of error,—but with respect to the fining of juries, and other misconduct imputed to him in his office, for which the law of the land gave no remedy or redress.

Lord *Denman*.—Can you say that, after *Bushel's* case?

Mr. *Attorney General*.—*Bushel's* case amounted to this, that *Bushel* being fined at the Old Bailey for delivering a verdict of acquittal contrary to the wishes of the Judge, and imprisoned for not paying the fine, was discharged by the Court of Common Pleas upon a *Habeas corpus*; but it was held, that no action could be maintained for the imprisonment he had suffered. That case I shall bring before your Lordships by-and-by. Lord Chief Justice Hale, you may recollect, strongly discouraged the action brought for redress, and said, "They will have a cold matter of it." And why did *Bushel* and the other jurymen who served on the trial of Penn and Mead obtain their liberty? It was because they were committed by a Court of Oyer and Terminer at the Old Bailey,

*Bushel's case.*

an inferior tribunal. Had that commitment been,—not by the Court of Oyer and Terminer,—but by Chief Justice Kelyng and his companions, sitting on the bench now adorned by the Judges I have the honour to address, there would have been no legal remedy even for the imprisonment; because the Court of Common Pleas would have said, “This is a Court of co-ordinate jurisdiction; we cannot review its decisions; we cannot judge of the contempts of an equal Court, and the prisoners must be remanded.” But for such illegal acts Lord Chief Justice Kelyng was summoned before the Committee of Justice; he attended before that Committee, and afterwards attended before the whole House. He was accused and heard in his defence; and there never was a doubt raised in his own time or since respecting the legality or constitutionality of that proceeding on the part of the Commons. The distinction it always to be made between erroneous judgment, and corruption and oppression. For erroneous judgment the law has pointed out the proper remedy by appeal; but for corruption or oppression the only mode is for the Grand Inquest of the nation to inquire, that they may inflict punishment and afford redress. It is, my Lord, this high tribunal having these functions that is supposed to have no more power than any profession or trade!

My Lords, there have been many instances of Judges who have been summoned before the House of Commons to answer for alleged misconduct in their office. The Lord Chief Baron Atkyns says, “I myself have seen the Lord Chief Justice of this Court while he was the Chief Justice, a learned man, by leave from the House of Commons, pleading before that House for himself, and excusing what he had done upon a trial which came before him in the west, whereof complaint was made to the House; he did it with that great humility and reverence, that those of his own profession and others were so far his advocates that the House desisted from any further prosecution.” This was not, of course, for any point that had been improperly ruled by the Lord Chief Justice upon the Western Circuit, but it clearly was for some op-

Case mentioned  
by Atkyns.  
13 How. Sta. Tri.  
1412.

pression or corruption that had been imputed to him, and for which the law gave no regular redress.

*Mr. Justice Coleridge*—I lost the name of the Judge.

*Mr. Attorney-General*.—He does not mention the name, and it is possible that he may refer to the proceeding against Kelyng;—but it may be material to shew that such a sage of the law as Chief Baron Atkyns sanctions by his high authority the legality and propriety of such a proceeding.

My Lords, after the Revolution, the same course has been pursued.

Case of C. J.  
Pemberton and J.  
Jones  
14 East, 102 n.  
1 W. and M.  
A. D. 1689.

Your Lordships will recollect, that Chief Justice Pemberton and Mr. Justice Jones were summoned before the House of Commons, and committed by the House of Commons for a breach of Privilege in their judgment in the case of *Jay v. Topham*. According to the account of that case, in 14 East's Reports, it might be thought that they were harshly used; for it would there appear that the judgment in point of law was correct, there being only a plea to the jurisdiction, and that plea not covering the whole declaration; but I shall show your Lordships that they were justly amenable to the displeasure of the House of Commons, for that a plea in bar had been pleaded, which they themselves acknowledged was a bar to the action on the ground of Privilege; and there is too much reason to believe that they were acting in concert with the Duke of York and his minions to pervert the law for the purposes of oppression. The Convention Parliament, by whom the Bill of Rights was framed, and by whom the charge against them was investigated, could better decide upon their guilt than we can pretend to do.

That such a power still exists in the House of Commons, no one can deny, although from the pure administration of the law in this country for many many years, which, I have no doubt, will long continue, there has been little occasion for the exercise of it. Even in our own time a complaint was made against a Judge from the sister kingdom, and he was heard upon it at the bar of the House of Lords. It never has been doubted that the House of Commons has at least equal power

Case of Fox, Irish  
Judge examined  
before House of  
Lords.

upon such a subject,—the House of Commons being always called the Grand Inquest of the Nation, to whom it particularly belongs to inquire into the administration of the law, and to see that no abuse or corruption, or oppression may be justly complained of by the subject. It is an act of this very tribunal superintending the administration of law in the Courts of Justice that you are now called upon to consider;—you are to constitute yourselves into an inquest upon the Members of the House of Commons,—and you are called upon to say that the House of Commons have been guilty of an illegal and oppressive Act.

My Lords, I have the highest and most unfeigned respect for the Court in which I have so long practised, and for those who administer justice in it; but, my Lords, although the Court of Queen's Bench is the highest Criminal Court in Westminster Hall, and though a Writ of Error lies into this Court from all inferior Criminal Courts,—although you have a right to grant a prohibition to inferior Courts which exceed their jurisdiction, and to award a Mandamus to inferior Courts to execute any duty the law imposes upon them,—in entertaining and deciding upon this action, you have no more authority than the lowest Court in the land. Even with reference to your high Prerogative Writs of Prohibition and Mandamus, you cannot direct them to the House of Lords or the House of Commons. I humbly conceive that you cannot award a Prohibition to the House of Lords against hearing an appeal. You have not yet issued a Mandamus to the House of Commons, commanding them to grant a sum of money in a committee of supply, or to admit a Member who alleges that he is duly elected. But really, my Lords, those who now-a-days argue against Privilege seem to think that the House of Commons is peculiarly under the control of my Lords the Judges of the Court of Queen's Bench, and that you are to decide this case as if you were considering the validity of a bye-law made by a municipal corporation, or the regularity of an election to the office of alderman, or an application for a *Quo warranto* information.

Power of Court  
of Queen's Bench.

My Lords, I have described what the House of Commons is, and I have referred to its privileges and powers. This Court, in respect to this action, has no power or privilege whatever,—except that it is a mere Court of Common Law. It is a very fine thing for my Learned Friend to talk of the Lord Chief Justice of England interposing for the liberty of Englishmen. The Lord Chief Justice of England upon this subject has no more jurisdiction or authority than any one of the lowest practitioners of the law who may sit in a County Court and represent the Sheriff, or a steward or bailiff appointed by the Lord of the Manor to preside in his Manor Court.

My Lords, this action might have been brought in a County Court without any Writ of *Justicies*,—laying the damages at 39s. By a Writ of *Justicies* it might have been brought in a County Court, laying the damages at any amount. It might have been brought in a Borough Court, or any Court, which has cognizance of an action on the case ; and if your Lordships have jurisdiction to inquire whether this Privilege exists, then all those inferior tribunals would be vested with similar powers.

This action might have been brought in inferior Courts,

and the question of Privilege submitted to them.

Now, my Lords, does it not seem monstrous to say, that when the question arises directly, it shall be competent to the Sheriff in his County Court, or to the attorney's clerk who represents him, to inquire whether the House of Lords or the House of Commons has a Privilege claimed, or whether this is usurpation? Is not a County Court subordinate to the House of Lords?

In the United States of America, the Supreme Court has paramount authority over the Legislature.

So are you !

My Lords, one can conceive that there may be a tribunal, a Court of Justice,—vested with supreme and paramount authority ;—and such a court of justice exists in the United States of America. The Supreme Court there has authority to decide controversies between the different States that form the Union,—to determine whether an act of Congress is legal or illegal,—and to adjudicate on all questions that arise between the whole Union and each separate State. There

might have been a tribunal established in this country, with power to control the two Houses of Parliament,—with authority to

say whether they had exceeded their jurisdiction or not. But is there such a tribunal? From the

But no such tribunal in England.

Supreme Court in the United States there is no Writ of Error. There is no appeal to Congress. The framers of the American Constitution are not guilty of such absurdity as to suppose that judges are to sit in judgment upon those who are to be their judges. Their Court is supreme; from its decision there is no appeal. According to the constitution of the United States of America, the decisions of this high Court are final and conclusive. Therefore, my Lords, there is no absurdity in that tribunal reviewing the acts of Congress; and if there were a commitment, by Congress or the Assembly of any separate State forming the Union, there would be no absurdity in coming before that tribunal and asking the Court to adjudicate respecting its validity. But from all judicial decisions in this country there is an appeal to

Parliament. Parliament with us is paramount; with us it is supreme,—without exception or qualification. According to the constitution of the United States, Congress has only a certain limited jurisdiction. It can only make laws upon particular subjects, and to a particular extent, and when it exceeds those limits, its acts have no authority. But the Parliament of England being sovereign and supreme, the appeal from all Courts of Justice is to Parliament.

Here Parliament is supreme.

My Lords, I now come to insist before your Lordships, that to the two Houses of Parliament the administration of the Law of Parliament, which is entirely different and distinct from the Common Law, is referred,—just as the Revenue Law is referred to the Court of Exchequer,—as the Ecclesiastical Law or Canon Law is referred to the Ecclesiastical Courts,—as the Law of Nations is referred to the Admiralty Court,—and as Equity is referred by the Constitution of the country, not to the Courts of Common Law, but to the Courts of Equity. These various Courts are

Administration of the Law of Parliament belongs to the two Houses, as Courts of exclusive jurisdiction.



respectively created for a peculiar department of the law, and when I come to the authorities I shall be able to show, I think, most distinctly, that the administration of this separate independent branch of the *lex terræ*, called the Law of Parliament, or Privilege, is expressly limited to the two Houses of Parliament as Courts of exclusive jurisdiction. It has been found convenient, even with regard to subordinate branches of the law, that particular matters should be referred to particular tribunals, so that the Judges of those tribunals might devote themselves to those branches of the law, and that there might be an uniformity of decision, which could not be expected if a great number of co-ordinate Courts had co-ordinate jurisdiction over the same subject.

Now, my Lords, I may say that from the nature of the thing it is indispensably necessary that the Law of Parliament should be referred to the two Houses of Parliament as Courts of exclusive jurisdiction. Why was this Privilege created and allowed by the Law and the Constitution of the country?—That the two Houses of Parliament might independently and effectively perform the functions that the Constitution assigns them.

My Lords, this power inherent in the Houses of Parliament has existed in the Houses of Parliament from their original creation. They could not exist without such a power. Privilege is not granted by the Crown; it is as old as the prerogatives of the Crown; it is part of the Constitution of England. Now, my Lords, it would be utterly impossible that Privilege could have existed beneficially, if the existence of the Privilege had been referred to the decision of any inferior tribunal. From the necessity of the thing, Parliament when it was one chamber, and the two Houses since the division, must necessarily decide upon Privilege. My Lords, the Privileges of the House of Commons are given to them for a protection against the Crown, and against the other House, and unless the House of Commons were itself the tribunal to decide upon this subject, their Privi-

Necessary that the Law of Parliament should be referred to the two Houses.

Since separation each House decides upon its own Privileges.

Privileges enjoyed by House of Commons as protection from Crown and House of Lords.

leges would long ago have been extinguished, and nothing would have been left to the House of Commons but to lay taxes upon the people, at the absolute command of the Ministers of the Crown.

Against the Crown it was indispensably necessary that this jurisdiction should belong to the House of Commons, and should not be referred to the Courts of Common Law. We must not look to the manner in which the Courts of Law are now constituted, when the Judges are independent of the Crown—when the administration of justice is pure and impartial, and deservedly obtains the respect and veneration of the people. The Law of Parliament

Law of Parliament was settled when the Judges were dependent on the Crown.

and its bounds, and the jurisdiction to decide upon it, were all determined and settled at a period when the Judges were the mere creatures of the King—when they held their office during pleasure—and if they did not gratify the Crown in any of its wishes, they were discarded, and others more compliant were placed in their stead. The Law of Privilege must have taken its origin even at a period when the King himself used to interfere in the administration of justice; and although the practice for the King to sit in Court had become obsolete in the reign of James the First, and he was told he could only administer the law by his Judges, there can be no doubt that at an earlier period the King personally sat in his *Aula Regia* as a Judge, and administered justice to his subjects. The Judges called in were his assessors, and according to his pleasure, he either observed or disregarded the advice received from them.

But long after the King had ceased to interfere by sitting in Courts of Justice, the King was in the habit of writing letters to the Judges, desiring them to decide in a particular mode the causes which came before them. My Lords, there was an Act passed in the 2nd of Edward the Third to check that practice. There was another in the 18th of Edward the Third, which contains the oath imposed on the Judges, and, among other things, they were to swear not to attend to such letters,—clearly showing that before that Act passed they had been

Royal Mandates to Judges how to decide.

Abolished by stat. 2 Ed. 3, c. 8, A. D. 1328. Judges' Oath, 18 Ed. 3, st. 4, A. D. 1344.

in the habit of doing so ; and I am afraid that even afterwards the Judges were still so dependent that the Act and the oaths prescribed had but little effect ; for it was in the following reign of Richard the Second that the famous answer was given by Tresilian, Belknap, and others upon the subject of Privilege, which I shall presently bring before the Court. There can be no doubt that the Judges, at the time the Law of Privilege was settled, were the mere creatures of the Crown—that if questions of Privilege had been referred to them for consideration, and they had jurisdiction over the subject, Privilege would soon have been crushed, and the liberties of this country extinguished. But it is not because the

Judges now independent, but their jurisdiction not extended.

Judges are now independent that their jurisdiction is extended. You have no further jurisdiction on this subject than belonged to the Judges in the time

of James the Second, and Charles the Second, or than belonged to the Judges in the time of Richard the Second, when Tresilian and Belknap gave their opinions upon questions of Privilege to the Crown. If Tresilian and Belknap had not this jurisdiction, neither have my Lord Denman and his companions. And, my Lords, most melancholy would have been the situation of the liberties of this country if such a power had been placed in the profligate hands of such Judges as formerly disgraced the ermine they wore, who were just as subject to the dictates of the Crown as Privy Councillors or Officers of State. Happily the Judges are now independent ; but their jurisdiction remains unchanged ; and it lies on my Learned Friend to show that in all times and circumstances the Courts have had jurisdiction to decide matters of Privilege.

My Lords, there is one Judge who is still removable—the highest Judge in Westminster Hall—the Lord Chancellor—

Lord Chancellor still removable at the pleasure of the Crown.

who may decide upon Privilege if you can. We have no reason to suppose from what we have seen for more than a century, that the Keeper of the

Great Seal is at all likely to betray his trust, or to decide either one way or another contrary to law on account of the frail tenure of

his office ; but still there must be a constitutional jealousy, and I say it is contrary to that constitutional jealousy that even now, in the nineteenth century, you should refer the decision of a matter touching the Privileges of the Commons to a Judge who retains office during the pleasure of the Crown.

My Lords, there is another danger which it is my duty to point out—which may hereafter occur in some remote time, wherein there may be a Judge, not seeking to favour the Crown, but who, either from rashly mistaking the law, or from wishing to extend the jurisdiction of his Court, or betrayed by a love of popularity, may overrule a useful and wholesome and constitutional Privilege, and wantonly seeking a collision with the Houses of Parliament, produce consequences as mischievous as if he acted from a desire to gain the favour of the Minister of the day. “A popular Judge,” says Lord

Possible dangers that might arise hereafter if Judges had jurisdiction over Parliamentary Privilege.

Lord Bacon's Address to the Judges before the Summer circuit, 1617. Lord Bacon's Works. Ed. 1819. Vol. 4, p. 497.

Bacon, “is a deformed thing : and *plaudites* are fitter for players than for magistrates.” My Lords, I will further use the freedom to read upon this subject an extract from the Judgment of Lord Mansfield in the Dean of St. Asaph's case :—“The Judges are totally independent of the Ministers that may happen to be, and of the king himself ; their temptation is rather to the popularity of the day : but I agree with the observation cited by Mr. Cowper, from Mr. Justice Forster, that a popular Judge is an odious and pernicious character.” Now, my Lords, against such dangers in future, the Privileges of the House of Commons, which are the Privileges of the people, must be cautiously and anxiously protected.

For above a century there were many struggles between the Crown and the House of Commons,—the House of Commons insisting that it had the power to inquire into the government of the country—that it had a right to overhaul the proceedings of the Ministers of the Crown,—the Crown insisting that it had the power to direct what was to be done in Parliament, and had a right

Former struggles between the Crown and the House of Commons.

to punish any Member for any thing considered presumptuous or refractory. There were various commitments of Members of the House of Commons by Elizabeth. The same course was pursued by James the First, and attempted by Charles the First ; and it was not until the glorious Revolution that the liberties of the country were placed upon a firm foundation. During that memorable period when there was this constant struggle between Prerogative and Privilege, I ask your Lordships if it had been the Law of England that Privilege was to be decided by the King's Judges, would Privilege have survived? I shall shew your Lordships by authorities not only parliamentary, but from the common law, that during this eventful period, the Court did not exercise or claim the right to inquire into Privilege, and that even then the constitutional doctrine was, that Privilege was to be decided by the two Houses respectively, as tribunals enjoying exclusive jurisdiction.

So much for protection against the Crown. Let us next consider how the Privileges of the Commons are to be  
Protection against the Lords. protected against the other House of Parliament.

There have been various struggles between the two Houses, particularly towards the close of the seventeenth century, and such struggles may again occur. My Friend contends, that all questions of Privilege are open to all courts of Common Law. The consequence is, that they must all come to be ultimately determined by the House of Lords. There is a Writ of Error or Appeal from every Court in the country to the House of Lords on all questions properly cognizable by them. It follows, that all the Privileges of the Commons are at the mercy of the Lords. The Lords, perhaps parties to the dispute, are to be Judges in their own cause. In a controversy between the Lords and Commons, this controversy is to be decided by one of the litigating parties. Is it possible to say that the Commons hold their Privileges by such a tenure?—that it is in the power of the Lords to overrule, abolish, and extinguish them? If such a power had existed, in the keen and reckless

In disputes with Lords, no action struggles which took place between the two Houses, would it not have been fatally exercised? The course

ever brought for  
commitment by  
Commons.

was obvious and easy. In the cases to which my Friend has referred, where there were commitments by the Commons of persons for pleading at the bar of the House of Lords, an action might have been brought in a Court of Law for the imprisonment, and if a justification under the authority of the House of Commons had been held sufficient, upon a Writ of Error, it would have been overruled. But when the counsel were committed in *Shirley v. Fagg*, or the *Queen v. Paty*, was any action thought of? In the *Queen v. Paty*, a Writ of Habeas Corpus was sued out, and eleven of the twelve Judges held it was a question of Privilege upon which they had no jurisdiction. But in the instances where the powers of the House of Commons were exercised in the most exceptionable and revolting manner, no action was ever brought by the suffering party—from the settled conviction, that for no act however arbitrary, of either House, in the exercise of Privilege, could any action be maintained. And why could no action be maintained?—because a Court of Law could not inquire into a question of Privilege. If it can, then the Lords become the paramount power in the State. Now with all due respect for that noble and illustrious body, would it be a right thing that the Privilege of the Commons on which public liberty depends should be at their beck? The Lords may be trusted with questions originating in the Courts of Law between subject and subject, but cannot be safely trusted where the Commons are a party—the Commons a rival power in the State whom they have only to crush to be supreme.

Irresponsibility of  
House of Lords.

Bear in mind that the House of Lords are wholly irresponsible, and that the constitution has hardly provided any remedy, should they be guilty of usurpation or tyranny. They are beyond the control of the Crown, and they are wholly independent of the people. For any misconduct of the House of Commons there is a clear remedy, in a dissolution of Parliament and an appeal to the country. In this way, unconstitutional acts of the House of Commons have often been remedied. But what remedy is there for the errors of the supreme paramount irresponsible tribunal, in which it is proposed to vest absolutely the

power of disposing of the Privileges of the Commons. If Parliament is dissolved, the same individuals who constituted the House of Lords are *de jure* summoned, and they meet again,—having learned nothing and forgotten nothing. The power of overwhelming a large majority of this assembly by the creation of new Peers, may be usefully held up in terrorem; but could hardly be twice exercised, and cannot be considered an ordinary engine of control within the ordinary limits of the constitution.

Upon the question as to jurisdiction on Privilege, the liberties of England have depended, and may again depend. I say it is to the assertion of this jurisdiction on the part of the Commons that we are mainly indebted for the freedom we now enjoy; but it is now proposed that this jurisdiction be first referred to officers of the Crown called Judges, and then that it should come to be finally exercised by the House of Lords—wholly irresponsible, and under no control, either from the people or the Crown.

I come now to a topic which I am sure your Lordships will allow me to touch upon without offence—a topic supplied to me by writers of great authority. The constitution supposes that this *lex parliamenti* to be administered by the two Houses of Parliament is not known to the Judges of the common law, and that they have no means of judicially acquiring a knowledge of it. De facto it sometimes happens that the Judges have served in the House of Commons, and, for the dignity of our profession and the public good, the head of this court is now generally a Peer:—but as common law Judges your Lordships know nothing of the law of Parliament. You cannot sit in the House of Commons, and the law was a settled long before any common law Judge had been a Member of the other House of Parliament. But how is the law of Parliament to be known by the freeholders who sit as judges in the County Court; by the under-sheriffs and their clerks, by the stewards presiding in the Manor Courts which hold plea in personal actions? They have never been Parliament men, and it is in Parliament and in Parliament alone that the law of Parliament can be learned or

Common Law  
Judges as such,  
ignorant of law  
of Parliament.

administered. Shall it be said that there is no privilege except that which has been recognized and established by judicial decision, and that you must look into reports and consult abridgements to determine whether a privilege claimed is to be allowed or overruled? If judicial decision be the test, many of the most usual and necessary privileges of Parliament must be overruled, as they have never at any time been questioned. The law of Privilege never has been codified, and there are uncontested Privileges,—such as the right to print a criminatory paper for the use of the members of a committee,—unnoticed by any text writer. Are the journals to be searched as the repository of Parliamentary law? The journals, which have been said to be no part of the library of a common law Judge, go back a very little way compared with the antiquity of Parliament, and there are important privileges of which no trace is to be found in the journals—depending on usage and tradition.

It has been said by way of answer that all the Queen's subjects are bound to take notice of Privilege, and must therefore be supposed to know it in all its details. But all the Queen's subjects female and male, old and young, are bound to take notice of the Common Law, and ignorance of law excuses no one. But is this a judicial knowledge? According to such reasoning all the Queen's subjects male and female are competent to administer the Common Law like your Lordships.

How then my Lords are inferior tribunals to decide on questions of Privilege? What knowledge have they upon which they can safely act? If the House of Lords or the House of Commons assert that a Privilege exists and act upon it, how can a Court of Law safely deny the existence of the Privilege and adjudge the act to be illegal? How can the common lawyer be sure that the Privilege does not exist, and that it has not been frequently acted upon? There is a saying of Speaker Onslow in point, which your Lordship will excuse me if I mention, as it is commemorated with approbation by Hatsell. “That common lawyers accustomed to the forms

“and practice of the Courts of Westminster Hall,

“know little of Parliamentary law, or of the forms



“of proceeding in Parliament.” If this be true of the common lawyers in Westminster Hall from whom the Judges of the Superior Courts are selected, what shall we say of the Judges of the County Courts and Borough Courts, who upon this subject have co-ordinate jurisdiction?

The jurisdiction of the Courts of Law on Privilege, if it exists at all, must be paramount and supreme, and from them Parliament must take the rule for its guidance. If the Courts of Law are not bound by what has been decided in Parliament, Parliament must be bound by what has been decided in the Courts of Law. It would be vain for Parliament to re-assert a Privilege which has once been overruled, and which would be again overruled in a Court of Law,—all acts done in the exercise of this Privilege being treated as illegal. The result is plainly this, that Parliament can have no Privilege except what the Courts of Common Law allow it. This is the humiliating condition to which by the principles of my learned Friend Parliament is necessarily reduced.

But from the variety of Common Law Courts in which it is proposed that these questions may be decided, Parliament may be much puzzled in ascertaining the rule which it is to obey. The Court for the county of Worcester may decide one way, and the Court for the County of Gloucester another way. Upon indictments for false imprisonment and libel in respect of acts done by the House of Commons, at one Court of Quarter Sessions they may hold that the Privilege claimed exists, and at another that the Speaker and the officers of the House are to be fined and imprisoned as malefactors. My learned Friend says there may be a difference of opinion on Privilege between the two Houses of Parliament if they are permitted to take cognizance of the matter,—and he proposes to erect five hundred tribunals with co-ordinate jurisdiction on the same subject.

Independently of uncertainty of decision, what would be the situation of affairs if an action or indictment would lie against the Speaker and the officers of the House,

Parliament must be subordinate to Courts of Law or Courts of Law to parliament.

Consequences of allowing jurisdic-

tion on privilege  
to Courts of  
Common Law.

to try the validity of every act done by the House?

If the order of the House is no bar to a civil action,  
it would be no answer to an indictment. See in

what situation the Speaker and the officers of the House are now placed. When indicted for a libel, even the truth of the accusation would be no sufficient defence. In a former case, to which I shall afterwards more particularly advert, where Mr. Stockdale brought an action like this against the printers of the House of Commons, and there being a justification that he did publish an obscene book, there was a verdict for the Defendant,—if he had adopted another mode of proceeding and indicted the printers or the Speaker, he must have obtained a conviction. The Speaker of the House of Commons being liable to such an indictment,—so is the Lord Chancellor, the Speaker of the House of Lords, there being publications of a criminatory nature ordered from time to time by that branch of the Legislature. The Speaker of the House of Commons or the Lord Chancellor going to preside in their respective houses may be arrested on a bench warrant, a bill of indictment being found against them for a libel in respect of a paper ordered to be published by a joint resolution of the two houses. Upon an indictment for libel there is no Privilege of Parliament, and to Newgate they must both go till bail is put in,—of which forty-eight hours notice might be required.

It was once decided by common law Judges, that Privilege does  
extend to such a case; but such Privilege was dis-  
claimed and negatived by both Houses of Parliament;  
and I conceive, that the law is now clearly established, that there is  
no Privilege of Parliament against a prosecution for libel. When  
the trial comes on, the order of the two Houses to publish being  
no defence, they must both be convicted,—the truth of the charge  
being rather an aggravation of the offence. This is no extravagant  
supposition. A criminal proceeding has been instituted against  
the Speaker of the House of Commons for a libel; and if Sir  
Robert Sawyer might in point of law file a criminal information  
against Sir William Williams, the Attorney-general for the time

Wilkes's case.

being may file a criminal information against the Speaker for any publication by the House which may be disagreeable to him or his employers ;—and as the law now stands, he may imprison the Speaker by his own authority ;—for the Defendant may be arrested and held to bail on a prosecution for libel, either by indictment or criminal information. Having never yet filed an *ex officio* information for libel, I have had no occasion to deliberate on the exercise of this power ; but there is no doubt that it exists.

I admit, that in the present times a prosecution by the Attorney-general for any publication authorised by Parliament, is an imaginary or theoretical danger ; but do you doubt, that if this action were to succeed, men like Mr. Stockdale would not exercise the right of preferring an indictment for such a publication, or that there would be much difficulty in prevailing upon a Grand Jury to find a true bill ? The next step will be to indict at the Quarter Sessions, and some distinguished Squire filling the chair, on proof that the Defendant was instrumentary in publishing by the authority of the House a paper containing a criminary charge against the prosecutor, would be required, according to the doctrine of my Learned Friend, to declare that Privilege was no defence, and to pronounce sentence of fine or imprisonment.

My Lords, this doctrine is not only alarming to those who now fill the offices of Speaker and Chancellor, but to all who have filled them and still survive. The statute of limitations does not extend to criminal cases ;—and Lord Sidmouth, Lord Canterbury, Lord Lyndhurst, and Lord Brougham, himself, may still be made amenable for the libels they have published, while occupying the Speaker's chair or the wool sack.

Such consequences follow inevitably from the law as contended for, and it is only by supposing that the constitution refers the jurisdiction over Privilege to the two Houses of Parliament themselves, that these consequences can be avoided. In short, the existence of the Privilege necessarily supposes that the Privilege shall be declared and adjudicated upon by the House of Parliament, to which it belongs,—without suffering the question to be referred to

any other tribunal. If you say with some, that there is no such thing as Privilege, and that all arguments in favour of Privilege would lead to the doctrine that Members of Parliament may rob and murder on the high way with impunity,—you may well say, that the two Houses of Parliament have no jurisdiction on the subject. But if the existence of Privilege of Parliament is recognised,—to no tribunal, except Parliament, can the power of judging of it be intrusted. If the House of Commons is only to be treated as a petty corporation, or a debating society, or the voluntary meeting of the members of a trade to consider how it shall be regulated,—*cudit quæstio*. But on the other hand, those who hold such language admit, that if there be such a thing as Privilege, the limits of it must necessarily be referred to the two Houses of Parliament. In a passage in the publication to which I used the freedom to refer (Lord Brougham's Preface to his judgment in Long Wellesley's case) his Lordship expresses a clear opinion, that if Privilege exists, the

Houses of Parliament must have exclusive jurisdiction over it in every case which may arise ;—for he observes, that “ the Privilege champions, in order to be consistent, must maintain that the Houses of Parliament alone are the judges of their Privileges ; this right is worth nothing, if it is confined to the judging of the general and abstract question.”

The issue therefore is “ Privilege or no Privilege ?”

I have now closed my observations on this head.

*Lord Denman.*—We will go on to-morrow.

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## SECOND DAY.

WEDNESDAY, 24TH APRIL, 1839.

Mr. ATTORNEY-GENERAL.—My Lords, I now come to consider the objections which have been, or may be made, to the exclusive jurisdiction of the two Houses of Parliament in matters of Privilege.

Objections to the exclusive jurisdiction of Parliament over Privilege.

One objection strongly urged is, that it would give a legislative power to each House, independent of the other, and of the Crown; and this seems to be relied upon by the Plaintiff, who, in his causes of demurrer, says that the House of Commons cannot of itself make laws.

First objection:  
That it gives each  
House a legisla-  
tive power.

Now, I admit most clearly, that no single branch of the legislature can make laws without the concurrence of the other two branches;

No other right is  
claimed than what  
is exercised by  
every Court of  
exclusive jurisdic-  
tion,—viz. to de-  
clare the law.

but I say, that no such power is ascribed to either House by the doctrine which it is my duty to support. My Lords, this doctrine is no more than saying, that the Houses of Parliament, like various courts in this country, are courts of exclusive jurisdiction. You have the Ecclesiastical Court, you have the Admiralty Court, you have the Revenue Court of Exchequer, and other courts, in which is vested an exclusive jurisdiction over a particular branch of the law. These courts have not the power to make the law, they have only a power to declare the law. The House of Commons cannot give to itself a new Privilege, any more than the Court of Admiralty can extend its jurisdiction, or alter the law of the land. But of the questions that are properly cognizable in the Court of Admiralty, your Lordships will not take cognizance here. Your Lordships will not decide prize or no prize, nor any question arising even incidentally upon that subject. If an action for false imprisonment were brought by a person who was on board a ship that was captured, and it turned out that the imprisonment arose from capture as prize, your Lordships would not, even in an action for this personal wrong, take cognizance of the question, whether the capture was lawful or unlawful. So a judgment of the Ecclesiastical Court upon a question of marriage is binding; a judgment of the Court of Exchequer *in rem* upon a question of forfeiture is binding,—because it is the judgment of a court of peculiar jurisdiction, to whom exclusive power is given by the constitution of the country.

My Lords, it might just as well be said, that the Courts of

Common Law have a legislative authority by administering the Common Law. Though your Lordships have no jurisdiction over Privilege,—as Judges of the Court of Queen's Bench your Lordships have a jurisdiction over all questions of Common Law, civil and criminal. We have heard much of "Judge-made law,"—and there is a great deal of our best law that may be so described. I think Pemberton said, in the reign of Charles II., that he himself, in his time, had made more law than King, Lords, and Commons; but that is, properly speaking, not making law, it is merely declaring the law. This law is supposed always to have existed, and merely to be declared by the Judges. But although the Judges have no legislative authority,—by declaring the law, it may be said, they have a power to alter the law of the land.

My Lords, as it has been found convenient to assign particular branches of the law to particular tribunals,—the Common Law to the Courts of Common Law, —equity to the Courts of Equity,—international law to the Court of Admiralty,—canon law to the Ecclesiastical Courts,—*pari ratione*, Parliamentary law has been assigned for its administration to the two Houses of Parliament. With regard to Parliamentary law, it was essentially necessary, that this distribution should take place, because, to prevent collision, it is quite clear, that either the Courts of Law must be subordinate to the two Houses of Parliament, or the two Houses of Parliament must be subordinate to the Courts of Law. The subordination of the two Houses of Parliament to the Courts of Law, as I think I have shown to your Lordships, would be wholly inconsistent with Privilege; and if such a doctrine had prevailed, Privilege would long ago have been extinguished, together with the liberties of the country. Unless Privilege is to be entirely abolished, the Courts of Common Law have no jurisdiction upon the subject. Certainly there is one great authority for abolishing Privilege altogether. But as I ventured to mention to your Lordships

It might as well be said, that the Courts of Law exercise a legislative authority.

Particular branches of law are assigned to particular tribunals.

yesterday, even according to that authority, if Privilege does exist, it must be assigned exclusively to the cognizance of the two Houses of Parliament.

The next objection is the liability to abuse which would arise if such a power were to be acknowledged to exist in the two Houses of Parliament.

Second Objection:  
liability of power  
to abuse.

This is the great argument of the unthinking many, and it certainly has made some impression upon the public mind. But I humbly apprehend, that it is not a legitimate argument. You cannot possibly argue, from the possibility of abuse, that the power does not exist. In every balanced government—wherever there is not a pure despotism, the supreme power of the state must be parcelled out among certain functionaries and public bodies, who, if they conduct themselves properly, will act for the public good within the limits assigned to them—in whom confidence is reposed by the constitution,—who may to a certain degree be checks upon each other,—but for whose abuse of power no remedy can be provided by the common process of law.

My Lords, without at all referring to the constitutions of other countries, let me refer to the happy constitution of our own. In

England, where we have a limited monarchy, there are certain prerogatives belonging to the Crown. There is the prerogative of making peace and war,—the prerogative of pardoning offences,—the prerogative of calling, and proroguing, and dissolving Parliaments. My Lords, for the abuse of each of these powers, so far as the Sovereign is personally concerned, the law provides no remedy; and though his responsible advisers might be afterwards punished, the acts done on their advice are valid;—but for the public safety, and for the due administration of justice, these powers are conferred upon the Sovereign,—in the confidence that they will be exercised wisely and discreetly. And yet it may be said the Sovereign may make war wantonly with all the world, or the Sovereign may pardon all criminals, and create an entire impunity for crime; or the Sovereign

Same argument  
against Prerogatives of the Crown.

may call or dissolve Parliament from mere caprice, and render the best labours of the Legislature utterly fruitless.

The House of Lords have certain high powers allotted to them by the constitution ; amongst others, the power of judi-  
Powers of the House of Lords. cature in the last resort ; and where they are not parties (which they would often be in questions of Privilege, if questions of Privilege were to be mooted in the Courts of Law, and brought before the House of Lords) that power of judicature is wisely and usefully awarded to them. But they may abuse it, in which case there would be no legal remedy. They have it in their power to alter the law of the land. They might repeal an Act of Parliament. They might decide that the second son should inherit instead of the eldest son : and how could such a decision be reversed ? What remedy would be open to the party who had been injured ? So they may fine and imprison for contempt ; and suppose for some trifling contempt—let me say for bringing an action against the door-keeper of the House for the value of an umbrella—they were to impose an enormous fine—100,000*l.*—and sentence the party to twenty years' imprisonment ; what redress could he obtain in the Courts of Law ?

My Lords, there are certain powers assigned exclusively to the House of Commons,—for example the power of  
Powers of the House of Commons. voting the public money. This is most usefully exercised by the House of Commons when they are acting constitutionally. But, it may be said, they may stop the supplies, not only when there is a public grievance,—when the Ministers of the Crown are acting tyrannically,—when the Crown will not dismiss Ministers who have lost the confidence of both Houses of Parliament and are odious to the people ; but the House of Commons, for the purpose of defrauding the public creditor, may stop the supplies when the Government is wisely and constitutionally administered. They likewise have the acknowledged and undoubted power of committing parties for contempt. They may abuse this power also, and there is no legal remedy for the abuse.

The same argument might be used against the existence of the



Powers vested in the Attorney-general.

powers of various officers under the Crown. As her Majesty's Attorney-general, I myself may enter a

*Nolle prosequi* upon any indictment. It might be said, shall such a power be given to an officer under the Crown, by which the administration of justice might be impeded and stopped? It is a power that I have exercised, and my Learned Friend near me, I think, while he was in office, likewise exercised it, and I believe with the approbation of all who knew the circumstances of the case. It is a power that usefully belongs to this office for the public benefit; but it is liable to abuse? Again, a Writ of Error in criminal cases cannot be brought without the fiat of the Attorney-general; and it may be said that innocence thus has no protection, because it may depend upon the caprice of an officer of the Crown whether an erroneous judgment, by which a person has been improperly convicted, may be reversed. My Lords, I have, in the exercise of my discretion, withheld my fiat where it appeared to me to be my duty to do so. If there is a question at all arguable, by all means let it be argued on a Writ of Error; but if it be proposed to bring a Writ of Error in a case of felony, when, exercising my best judgment it appears to me that the question is not arguable, and that the Writ of Error is brought merely for delay, and to prevent the sentence from taking effect, I withhold my fiat. This is an useful discretion lodged in a public officer, but liable to the greatest abuse, and it must be exercised upon his responsibility. So again, the Attorney-general's power of filing criminal informations is one which is undoubtedly capable of abuse, and has been abused, but it is a power which as undoubtedly does exist, and may be usefully and laudably employed.

Powers of the Legislature.

But, my Lords, only look to what might be done by Parliament itself, the three branches of the Legislature concurring. By the constitution of America, Congress has limited power. By the constitution of England Parliament has unlimited power, and there might be an Act of Parliament to change the religion of the country against the wishes of the people; there might be an Act of Parliament for making the Par-

liament last during a king's life, or for abolishing the House of Commons ; there might be an Act of Parliament for introducing a pure despotism into this country ; there might be an Act of Parliament (if you can suppose any thing so monstrous) for putting to death all children under three years of age. What is to be done upon such occasions ? Resistance is the only remedy. Revolution has begun. The law has provided no remedy. Society is dissolved. The constitution must be re-constructed.

My Lords, the same argument, if it may be so termed, derived from the liability of power to be abused, may  
Powers of the  
Courts of Law. equally be applied to the Courts of Law themselves.

These Courts may abuse their powers—they may alter the law, and make new law under pretence of declaring the old law. The Courts of Law, for instance, might decide that a Member of Parliament is liable to be arrested for debt during the sitting of Parliament, or that the House of Commons has no power to commit a party for prevarication, or for obstructing the Members, or for a contempt committed in the face of the House. Undoubtedly a Court of Law *de facto* may so abuse its powers, and exceed its jurisdiction. And if the Courts are to be the judges of Privilege, and are to determine what is, or what is not Privilege, it may just as well be said of them as is now said of the House of Commons, that they have a legislative power,—that is, the power of altering law,—which would be done as effectually by disallowing an old Privilege as by creating a new one.

But, my Lords, with regard to this liability to abuse, I acknowledge that Privilege has been abused ; my Learned Friend, Mr. Carington, assisting Mr. Curwood, stated various instances of this. It is not worth while to examine them minutely ; I believe it would turn out that there is a good deal of exaggeration in his statement of those cases, and that many of them really were connected with Parliamentary Privilege, and with an obstruction of Members in the discharge of their duty ; but I have no difficulty in admitting that Privilege has been abused by the House of Commons,—and just

as much by the House of Lords. I have made a collection of instances of abuse by the House of Lords, which are pretty much parallel with those that were cited by my Learned Friend, Mr. Carington. In a long course of ages it is not difficult to show that the power of Parliament has been abused ;—and so the Prerogatives of the Crown have been abused,—and Courts of Justice have abused the power conferred upon them. But that is no argument to show that those powers do not exist.

It seems, however, to be supposed, that the House of Commons consists of persons who will do nothing but convert the law to their own private advantage for the purposes of corruption or faction, and that the Judges are pure intelligences who will independently and unerringly declare the law, and consult nothing but the cause of truth and justice. My Lords, the constitution supposes that the House of Commons consists of upright and intelligent men, possessing the confidence of their constituents, who will justly exercise the functions which the constitution assigns to them ; and I believe of the House of Commons, that no assembly that ever existed in any country, has, upon the whole, better discharged its duty to the public.

But let me just remind your Lordships of what has been said and

Judges have been guilty of misconduct.

Mr. St. John's Speech,  
3 How. Sta. Tri.  
1273.

Wayland, C. J.,  
C. P. temp. E. 1,  
attainted for taking bribes.

Thorpe, C. J.,  
K. B., temp. Edw.  
3, hanged for same offence.

done in a few instances by the Judges, and ask your Lordships to consider what would have been the situation of the country if questions of Privilege had been referred to their determination. I will read your Lordships a passage from a speech of Mr. St. John on the question of Ship-money ; he says, “ Sir Francis Wayland, Chief Justice of the Common Pleas, in the time of Edward the First, was attainted of felony for taking bribes, and his lands and goods forfeited, as appears in the Pleas of Parliament, 18 Edward I., and he was banished the kingdom as unworthy to live in that State against which he had so much offended. Sir William Thorpe, Chief Justice of the King's Bench in Edward the Third's time, having of five persons received five

several bribes, which in all amounted to 100*l.*, was for this alone adjudged to be hanged, and all his lands and goods forfeited.

I need not remind your Lordships of the conduct of the Judges in the great case of Ship-money, in which they held that there was a power of taxation in the Crown,—that the Crown might raise money from the subject under the pretence that it was necessary to equip ships,—and that the necessity for that was to be judged by the Crown alone—the application of the money raised being left to the Crown without account or responsibility.

Conduct of the Judges on the question of Ship-money.

There is the case of *The King v. Darnell*, to which I will by-and-by refer your Lordships more particularly, where the Judges held, that where there is a commitment by the King in Council, there lies no *Habeas corpus*;—whereby *lettres de cachet* would have been established in this country, if that decision had not been reversed by Parliament.

In *Darnell's case*, A. D. 1627.

My Lords, without entering into the wide field of the general misconduct of Judges, I would rather confine myself to some cases of Parliamentary Privilege upon which the Judges have given their opinion,—and I will begin with the case that occurred in the time of Richard the Second, and read a few of the opinions given upon matters of Privilege by some of the most eminent of the Judges of that day. There having been an Act of Parliament passed by both Houses, with the consent of the Crown, which became very disagreeable to Richard the Second, he wished to get rid of it, and with this view he took the opinions of the Sages of the law upon certain questions of Privilege. “The King assembled at Nottingham Robert Tresilian, Chief Justice of England, and Robert Belknap, Chief Justice of the Common Bench of our Lord the King, John Holt, Roger Fulthorp and William de Burgh, Knights, Justices and associates of the said Chief Justice, and John de Lakton (on the part of the Crown) propounded certain questions to them upon matters of Privilege, “How those are to be punished who procured that Statute and Commission?” which

Conduct of Judges on matters relating to Privilege. Answers of Tresilian, C. J. K. B. and other Judges to K. R. 2. 1 Parl. Hist. 194.

was a statute passed in full Parliament with the consent of the Crown. The answer is, "That they were to be punished with death, except the King would pardon them."—"How those are to be punished who made the King to consent to the making of the said statute?"—Answer. "That they ought to lose their lives, unless his Majesty would pardon them."—"What punishment they deserved who compelled, straightened, or necessitated the King to consent to the making of the said statute and commission?"—Answer. "That they ought to suffer as traitors."—"How those are to be punished who hindered the King from exercising those things which appertain to his Royalty and Prerogative?"—Answer. "That they are to be punished as traitors." Now here comes rather an important question of Privilege—"Whether after, in a Parliament assembled, the affairs of the kingdom and the cause of calling that Parliament are by the King's command declared, and certain articles limited by the King, upon which the Lords and Commons in that Parliament ought to proceed, if yet the said Lords and Commons will proceed altogether upon other articles and affairs, and not at all upon those limited and proposed to them by the King, until the King shall have first answered them upon the articles and matters so by them started and expressed, although the King's command be to the contrary, whether in such case the King ought not to have the governance of the Parliament and effectually overrule them, so as that they ought to proceed first with matters prepared by the King, or whether on the contrary the Lords and Commons ought first to have the King's answer upon their proposals before they proceeded further."—Answer. "That the King in that behalf has the governance, and may appoint what shall be first handled, and so gradually what next, in all matters to be treated of in Parliament even to the end of the Parliament, and if any act contrary to the King's pleasure made known therein, they are to be punished as traitors." Another question was, "Since the King can whenever he pleases remove any of his Judges and officers, and justify or punish them for their offences; whether the Lords and Commons can, without the will of the King, impeach in Parliament any of the

said Judges or officers for any of their offences?" The answer is, "that they cannot"—(that there is no such power of impeachment), "and if any one should do so, he is to be punished as a traitor."

Now, is it to be supposed that, by the Constitution, it belonged to such Judges to decide on Privilege of Parliament?—Their fate, I fear, would have had little effect upon their successors. Tresilian was himself executed as a traitor. The contriver of death for others, he perished by his own art. Belknap, likewise, was convicted of treason, but escaped to Ireland.

Succeeding Judges have shown an equal disregard of the liberties of the people and of the law of the land.—I will give your Lordships

Opinions of the  
Judges in Stroud's  
Case, as to liabi-  
lity of Members  
for matters done  
in Parliament.  
3 How. Sta. Tri.  
235, *et seq.*  
5 C.1. A. D. 1629.

another example of the opinions of Judges respecting Privilege, that occurred in the year 1629, the 5th of Charles the First. There being an attempt in Parliament to inquire into some of the tyrannical acts of Charles and his Ministers, Selden wished a question for that purpose to be put by the Speaker from the Chair. The Speaker refused to put the question, stating as his excuse, "that he was otherwise commanded by the King." "Dare not you, Mr. Speaker, put the question, (said Selden) when we command you? If you will not put it, we must sit still: thus we shall never be able to do any thing. They that come after you may say they have the King's command not to do it; we sit here by the command of the King under the Great Seal, and you are by his Majesty sitting in this royal chair, before both Houses appointed for our Speaker, and now you refuse to perform your office." However, the Speaker would not put the question, still urging that he had the King's command that the question should not be put.

That Parliament was immediately afterwards dissolved. After the dissolution, Selden, Stroud and other Members were prosecuted in the Star Chamber for matters done by them in Parliament. Heath was then Attorney-general. He was afterwards impeached for having prosecuted these Members for what they had done in Parliament, thereby acknowledging that, even at that era, such a proceed-

ing was considered unconstitutional and unlawful. But it is stated, that “the King, purposing to proceed against the Members of the House of Commons, who were committed to prison by him in the Star Chamber, caused certain questions to be proposed to the Judges upon the 25th of April. Whereupon all the Judges met at Sergeants’ Inn by command from his Majesty, where Mr. Attorney proposed certain questions concerning the offences of some of the Parliament men committed to the Tower and other prisons; at which time one question was proposed and resolved, viz., that the Statute of 4th Henry VIII., intituled, ‘An Act concerning Richard Strode,’ was a particular Act of Parliament, and extended only to Richard Strode, and to those persons that had joined with him.” Your Lordships are aware that that Act of Parliament has been held repeatedly to be a general law. But the Judges held that it was merely a particular law, and did not at all prevent the prosecution in the Star Chamber of those Members for what they had done in the House of Commons.

Then another question put by Mr. Attorney at the command of the King to the Judges was, “whether a Parliament man committing an offence against the King or Council, not in a parliament way, might after the Parliament ended be punished or not?” Observe, the offence is supposed to be committed in the House of Commons; *e. g.* making a speech disagreeable to the King or the Minister. “All the Judges *und voce* answered, he might, if he be not punished for it in Parliament, for the Parliament shall not give privilege to any *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty, and all agreed that regularly he cannot be compelled out of Parliament to answer things done in Parliament, in a parliamentary course; but it is otherwise when things are done exorbitantly, for those are not the acts of a Court.” Therefore the Judges assume to themselves the power of reviewing what had been done in Parliament, and of determining whether it was done in a parliamentary way. If it was done in a parliamentary way, they allowed that they had no jurisdiction, but they arrogated to themselves the power to consider whether it was done in a parliamentary way,

and if, according to their fancy, not done in a parliamentary way, the power of punishing the offender. For unparliamentary language in Parliament, an action or indictment or information in the Star Chamber would lie.

Another question was this, "whether if one Parliament man alone shall resolve, or two or three shall covertly conspire to raise false slanders and rumours against the Lords of the Council and Judges, not with intent to question them in a legal course or in a parliamentary way, but to blast them and to bring them to hatred of the people, and the Government in contempt, they be punishable in the Star Chamber after the Parliament is ended?—Answer. The Judges resolve, that the same was punishable out of Parliament, as an offence exorbitant committed in Parliament beyond the office and besides the duty of a Parliament man."—An excellent recipe for wreaking vengeance, at the end of the Session, upon a troublesome minority.

My Lords, in "Nelson's Collections" there is an account varying a little from this of the questions and answers: I will just give a specimen of it. There were several questions proposed to the three Chief Judges about matters in Parliament, to which they gave these answers; "Whether a Parliament man offending the King criminally or contemptuously in the Parliament House (and not then punished), may not be punished out of Parliament?—Answer. We conceive that if a Parliament man exceeding the Privilege of Parliament, do criminally or contemptuously offend the King in the Parliament House (and not there punished), he may be punished out of Parliament." "Whether if a few Parliament men do conspire together to stir up ill affections in the people against the King and the Government, and to leave the Parliament, and by words or writings put it in execution, and this not punished in Parliament it being an offence punishable in Parliament, they may be punished out of Parliament?" They held that the Members were punishable out of Parliament for what they had thus done in Parliament.

2 Nels. Coll. 374,  
Cit. 3, How. Sta.  
Tri. 238.

The Members of the House of Commons who had incurred the



displeasure of the Court, being imprisoned on this extra-judicial opinion of their Lordships, I will state shortly the subsequent proceedings. A *habeas corpus* was moved by Stroud and the others, and upon the *habeas corpus* being sued out in the Easter term 5th Charles I., it was returned that Stroud was in custody by virtue of a warrant signed by twelve Lords of the King's Council; and also by a warrant under his Majesty's hand, which is in these words: "Whereas, you have in your custody the body of William Stroud, Esq, by warrant of our Lords of our Privy Council, by our special command, you are to take notice that this commitment was for notable contempts by him committed against ourself and our Government, and for stirring up sedition against us;" *this being for what had been done in debate in the House of Commons*. After lengthened argument scattered over several terms, and "when the Court were ready to have delivered their opinion in this great business, the prisoners were removed from the custody of the Marshal, and put in the Tower of London. But notwithstanding, it was prayed by the counsel for the prisoners that the Court would deliver their opinion as to the matter in law, the Court refused to do that because it was to no purpose, for the prisoners being absent, they could not be bailed, delivered or remanded." The King had sent a letter to the Judges informing the Court of the reasons why the prisoners were not suffered to come at the day appointed for the resolution of the Judges; and within three hours after the receipt of that letter, another was sent, which was as follows: "Whereas, by our letters of this day's date, we gave you to understand our pleasure, that of those prisoners which, by our commandment, are kept in our Tower of London, Selden and Valentine should be brought to-morrow before you; now upon more mature deliberation, we are resolved that all of them shall receive the same treatment, and that none shall come before you. Until we have cause given us to believe that they will make a better demonstration of their modesty, and civility both towards us and their Lordships, than at their last appearance they did.

"So the Court this term delivered no opinion, and the im-

prisoned gentlemen continued in restraint all the long vacation."

Each of the Judges of the King's Bench afterwards received a letter from the Council to be at Serjeants' Inn, upon Michaelmas day. The Chief Justice and Judge Whitelocke were afterwards summoned to attend the King, who, "taking them apart from the Council, fell upon the business of the gentlemen in the Tower," and "showed his purpose to proceed against them by the Common Law in the King's Bench, and to leave his proceeding in the Star Chamber. Divers other matters he proposed to the said Judges by way of advice, and seemed well contented with what they answered, though it was not to his mind, which was, that the offences were not capital, and that by the law the prisoners ought to be bailed, giving security for their good behaviour." "The first day of Michaelmas Term, it was moved by Mr. Mason to have the Resolution of the Judges, and the Court with one voice said, that they are now content they should be bailed, but that they ought to find sureties also for their good behaviour." The prisoners objected, that though "ready with their sureties for their bail, they were not for their good behaviour, and desired that the bail might first be accepted, and that they might not be urged to the other, for which they assigned reasons." Hyde, Chief Justice said, "If now you refuse to find sureties for good behaviour, and be for that cause remanded, perhaps we afterwards will not grant a *habeas corpus* for you, inasmuch as we are made acquainted with the cause of your imprisonment," namely, for what they had done in the House of Commons. The prisoners "were remanded to prison because they would not find sureties for their good behaviour."

Thus the Judges ordered Members of the House of Commons to be shut up in a gaol with felons, for not giving security that they would not again make or support a motion in their place in Parliament, offensive to the King or his Ministers;—and these are the Judges to whom it was supposed that the province of determining matters of Privilege is by the constitution assigned; and it is before their successors we are taunted with the excesses of the

House of Commons, and told that power cannot be intrusted to the Houses of Parliament because it may be abused!

My Lords, I may mention another instance of the respect of the Judges for Privilege: your Lordships will recollect that there was a contest in the time of James the First, as to whether the Privileges of the House of Commons were granted of grace and favour by the King, or were held as of right. The King insisted that he granted them as of grace and favour, and might withhold them if he pleased. The House of Commons made a protest against this doctrine, which was entered in the Journals. When Parliament was dissolved the King ordered the Journals of the House of Commons to be brought before him, "and in the presence of the Judges" (this is entered in the minutes of the Council),—probably at their suggestion,—and certainly without any remonstrance from them, this protest was erased from the Journals of the House of Commons by the King's own hand.

James 1. erased protest from Journals of House of Commons in the presence of the Judges, A.D. 1621.

My Lords, to show again what may be expected from the Judges, I would refer your Lordships to what they laid down in Sir Edward Hales's case, where, with one voice, they held that the King had the dispensing power. Chief Justice Herbert, the same individual who decided the King v. Williams, who had prosecuted the five Members, and who himself had been impeached for that tyrannical proceeding,—Chief Justice Herbert, after a consultation with the Twelve Judges, said, "We were satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare the opinion of the Court to be, that the King may dispense in these cases, and go upon these grounds." Now attend to the grounds upon which the Judges proceed.—

Sir Edward Hales's case, 11 How. Sta. Tri. 1165; 2 Shower, 475; Comberbach, 21; 2 James 2, A.D. 1636.

Opinion of the Judges as to the King's dispensing power.

" 1. That the Kings of England are sovereign princes.

" 2. That the laws of England are the King's laws.

“ 3. That, therefore, it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases, and upon particular necessary reasons.

“ 4. That of those reasons and those necessities the King himself is the sole judge.”

My Lords, such was the misconduct of the Judges in the times in which Privilege was settled, that Clarendon himself, no enemy to monarchy, and no enemy to the Judges, says of the conduct of the latter, that “ when the people saw in a Court of Law, that law that gave them title to the possession of all that they had, reasons of state urged as elements of law, Judges as sharp-sighted as Secretaries of State, and in the mysteries of state ; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof ; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds.

“ And here the damage and mischief cannot be expressed, that the Crown and State sustained by the deserved reproach and infamy that attended the Judges, by being made use of in this and like acts of power ; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves, but by the integrity and innocency of the Judges.”

Now I think, that these instances are a pretty good set-off against the abuses of Privilege by either House of Parliament, and show that to the Judges it would have been impossible to have referred the determination of questions of Privilege without the constitution being entirely subverted.

But, generally speaking, the law will presume, and rightly presume, that the Judges will do their duty ; so also with equal propriety will the law presume that the House of Commons will do their duty.

The law will presume that the House of Commons will do their duty.

Remedy for abuse of Privilege.

The true remedy for abuses of Privilege is to be found in the constitution itself, without any reference to Courts of Law, or any interference by inferior tribunals. My Lords, there may be a petition to either House by a

Petition to either House for revision.

party grieved, where he will be heard by himself, his counsel, or agent, and may call witnesses in support of his petition.

Conference between Houses.

There may be a revision of that which has been done by either House. There may be a conference between the two Houses. With regard to

Dissolution of Parliament.

the House of Commons, there may always be a dissolution of Parliament, and an appeal to the people.

Where there has been an usurpation of power on the part of the House of Commons, this has been found an effectual

Resolutions in Wilkes's case, A.D. 1769.

remedy. I may remind your Lordships of the Resolution of the House of Commons in Wilkes's case, whereby they held, that a Member expelled from the

House was disqualified from being re-elected, That was, I must confess, an abuse of Privilege; but what was the

Afterwards reversed, A.D. 1783.

correction of it? Not by an appeal to a Court of Law, but by an appeal to public opinion;—a House

of Commons being afterwards returned by the constituent body by whom that Resolution was reversed.

With regard to any individual loss or injury from any proceeding

House of Commons has awarded compensation where there has been injury.

of the House, there may be compensation awarded, and there are various cases where, upon petition to the House of Commons, compensation has been awarded, and an effectual remedy has been af-

forded.

My Lords, the interference of Courts of Law to correct abuses of

Interference of Courts of Law not necessary to correct abuses of Privilege.

Privilege is wholly unnecessary. It never has been put in practice. In all the various instances in which it may be said, that either House has abused its Privileges, there is not in the annals of the

administration of the law in this country one single instance of such an excess or abuse being corrected or remedied, or checked by the interference of a Court of Law. Is it when Privilege has long ceased to be abused, that we are to have a

No excess of jurisdiction since

remedy introduced, that was never thought of when Privilege was most rampant? Since Admiral Grif-

Admiral Griffith's  
case, A.D. 1760,

Excesses of former  
times have been  
corrected by the  
Houses them-  
selves.

Or by statute.

Instances.

At common law,  
a Member, in exe-  
cution for debt,  
was discharged,  
and the debt was  
extinguished.  
Stat. 2 (vulgo 1)  
J. 1, c. 13, A. D.  
1604, gives new  
Writ of Execution  
after Parliament  
ended.

fith's case, which occurred about the year 1759 or 1760, down to the present time, I am not aware of any complaint that has been made upon the subject; and there has been a constant study to accommodate the exercise of Privilege to public opinion. The excesses of former times were not corrected by actions, or informations, or indictments. My Lords, I venture to say, that there is not a single instance of any legal proceeding by which any subject of this country ever received a remedy for an excess of the authority of either House of Parliament; but, on the contrary, the two Houses of Parliament themselves have always been ready from time to time to do what was just and right, and for that purpose to pass Acts of Parliament when necessary.

At common law, if a Member of Parliament, being in execution for a debt, was discharged, the debt was extinguished, and the creditor had no remedy. That was a grievance to the subject. How was it corrected?—By an Act of Legislature, not by a suit at law. A Statute was passed 1st James I., c. 13, by the 2nd section of which, a party who had sued out execution might, after the end of the Session of Parliament, and when the Privilege had ceased, sue out a new Writ of Execution. Here Parliament itself administers a remedy for the grievance complained of.

Sec. 3 contains a  
legislative recog-  
nition of the power  
of the House to  
judge of their own  
Privileges.

The language of the 3rd section of that Act of Parliament is most material for the consideration of your Lordships. I say it is a Parliamentary recognition of the power of the two Houses to judge of their own Privileges, and to punish without the power of review. By that 3rd section it is provided as follows: "That this Act, or anything herein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in Parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest as is aforesaid." Cautiously re-

serving to the two Houses of Parliament the right which by the constitution of the country they enjoy, by their censure to punish any person for a breach of Privilege.

My Lords, by the 12th and 13th of Will. III., c. 3, sect. 1, permission is given to any person to commence and prosecute any action or suit in the superior Courts against any Member of either House, or against their servants, immediately after the dissolution or prorogation of any Parliament, until a new Parliament, or the same be re-assembled, and immediately after any adjournment for more than the space of fourteen days. This again removed a grievance that was complained of, that even when Parliament was not sitting, neither Members nor their servants could be sued, and it shows that till then that Privilege had existed.

12 and 13 W. 3, c. 3, (A. D. 1700), gives right of suit against Members and their servants in the superior Courts after dissolution or prorogation.

By the 11th of Geo. II., c. 24, this Act is extended to all Courts of Record in England and Ireland; and by the 10th Geo. III., c. 50, it is enacted, that any action or suit may *at any time* be brought against any Peer or Member of Parliament, or their servants. The statute of Will. III. only allowed suits to be brought at a certain distance of time after the dissolution or prorogation. But by the 10th of Geo. III., “any action or suit may *at any time* be brought against any Peer, or against any of the knights, citizens and burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain for the time being, or against their menial or any other servants.” By sect. 2 there is an express provision, that the persons of Members are not to be arrested or imprisoned; but as there is no such provision in favour of their servants, the effect of the Act was to take away from such servants the Privilege they had before enjoyed of freedom from arrest.

Extended to all Courts by 11 Geo. 2, c. 24 (A. D. 1738), 10 Geo. 3, c. 50 (A. D. 1770), gives right of suit against Members and their servants at any time.

Still further, to show the disposition of both Houses of Parliament to mould their Privileges according to public convenience, an Act passed in the 4th Geo. III., c. 33, which has been repeatedly renewed, and intro-

1 Geo. 3, c. 33, (A. D. 1763), contains provisions as to bankruptcy of Members. Renew-

ed in subsequent  
Bankrupt Acts.

duced into every Bankrupt Act since, by which any trader having Privilege of Parliament, if he does not pay or satisfy a legal debt to the amount of 100*l.* within two months after having been served with legal process, may be made a bankrupt. Before that statute this difficulty occurred, that as a Member of Parliament could not be arrested, there could be no act of bankruptcy by his lying in prison, and therefore, although a trader and insolvent, his creditors were without any means of having an equal distribution of his effects. For that evil this remedy is administered ; that being indebted to the amount of 100*l.*, if he is in trade, and does not pay the debt within a limited time, a commission of bankruptcy may be sued out against him, and he is stripped of all his property, real and personal, that it may be divided equally among his creditors.

These Acts of Parliament, changing the admitted and recognised law, have been spontaneously passed for the express purpose of facilitating actions and executions against Members of Parliament and their servants ;—for the express purpose of redressing evils which the Courts of Law could not remedy.

To show that there is no disposition on the part of the House of Commons to encroach, I may likewise refer your Lordships to what was done in the case of Mr. Long Wellesley, where, upon a Committee of Privileges being appointed, they held and reported that he was not entitled to Privilege of Parliament, he being guilty of contempt in the Court of Chancery of the authority of the presiding Judge of that Court. And there is the still more recent case of Mr. Lechmere Charlton, where that gentleman, having written a letter to a Master of the Court of Chancery, which Lord Chancellor Cottenham held was a contempt, and being ordered to be committed, and having written to the Speaker to claim Privilege, a committee appointed by the House of Commons to consider his claim, decided unanimously that the claim was unfounded.

Mr Wellesley's  
case, 2 Russ. and  
Myl. 659.  
4 Lord Broug-  
ham's Speeches,  
357. A. D. 1831.

Mr. Charlton's  
case, 2 Myl. and  
Craig, 316.  
A. D. 1836-7.

Claims of Privi-  
lege by Members  
disallowed by  
House of Com-  
mons.



My Lords, things have continued in this quiet and settled state without any appeal to the law, and without any grievance which was not remedied by the two Houses themselves, down to the time when Mr. Stockdale, the hero and champion of the rights of the people, brings this action, which I pronounce to be wholly unprecedented, and to rest upon no legal foundation. The action which Mr. Stockdale has brought is for an act done by the authority of Parliament, in the exercise of Privilege, and it is impossible to point out any instance in which legal proceedings have been successfully instituted for any thing done by the authority of either House, except the case of the *King v. Williams*, which is disclaimed as an authority. Down to the present time the Privileges of Parliament have been respected and preserved consistently with the rights and liberties of the people. What would have been the state of things if questions of Privilege had been resigned to the decision of the Courts of Law we cannot say with certainty; but judging from the few decisions in which the Courts have usurped the jurisdiction, there is great cause for apprehension that all the Privileges of Parliament would have been annihilated, and a thorough despotism long ere now established.

Present action  
unprecedented.

It is objected, however,—why not submit the Privileges of Parliament to the decision of the Courts of Common Law, as well as the Prerogatives of the Crown? My Lords, for obvious reasons. In the first place, anything done by an officer of the Crown in the exercise of the Prerogative professes to be done according to the Common Law, and the Courts of Common Law are competent to determine upon it. Prerogative is well defined; it is part of the Common Law, of which the Judges are cognizant. There is no other tribunal before which such a question can be agitated and decided. From the Courts of Common Law there is an appeal to a Court of last resort, independent of the Crown, which, upon questions between the Crown and the subject, must be supposed to be impartial. There is no danger from such a course,

Said that the Privileges of Parliament may as well be submitted to the Courts of Law, as the Prerogatives of the Crown.

and such a course, therefore, has been pursued without mischief or inconvenience.

It is observable, also, that for the exercise of a power on the part of the Crown, analogous to that which is now called in question, there would be no remedy at law. Suppose, my Lords, that a proclamation were issued by the Crown, offering a reward for the apprehension of an individual by name, on the charge of treason, or murder, or any other crime, could it be contended for a moment that an action or an indictment would be sustainable against the printer of such proclamation?

Then we are asked, what course is to be followed if something very outrageous should be done by either House of Parliament? Suppose there were an injunction from the House of Commons against proceeding in an ejection, or a warrant from the Speaker to put a man to death for an alleged breach of Privilege in suing a Member for a debt? What is to be done in such a case, my Lords? My answer is, that it is not decent, and it is not to be permitted, to make such a supposition. It might as well be said, what is to be done if the Sovereign should personally commit some great crime? Or what is to be done if the Judges of the Courts of Law grossly pervert their powers?

I would refer your Lordships to the observations upon this subject of Mr. Finch, afterwards Lord Nottingham, in the great case of *Monopolies, The East India Company v. Sandys*. He says, "I take it, the possibility of the abuse of power is no objection against that power; for by this argument, though the King has a power and prerogative by law to restrain subjects from going beyond the sea by a *ne exeat regnum*; 'No.' say they, 'he cannot; for then he may restrain all his subjects from going out of the kingdom, and so imprison and hinder every one from going out of the nation.' \* \* \* So that this way of arguing does strike at all power, and I need give no other reason for it; for there can be no power at all which is not accom-

Suppositions of  
flagrant abuse of  
power on the part  
of the House of  
Commons ought  
not to be made.

Lord Nottingham's  
argument in *The East India  
Company v. Sandys*, 10 How. Sta.  
Tri. 407. A. D.  
1684. That the  
possibility of  
abuse is no objec-  
tion to power.

panied with some trust; and there is no trust but it possibly (morally speaking) may be broken."

There is also, my Lords, a striking passage in Yorke's Law of Forfeiture, upon this possibility of abuse. He says,

Passage from  
Yorke's Law of  
Forfeiture, p. 108,  
2d ed. (1746), to  
the same effect.

"The law will not suppose the possibility of wrong, since it cannot mark out or assist the remedy; yet every member of that representative body might exclaim in the words of Crassus, the Roman orator, when he opposed the encroachments of a tyrannical consul on the authority of the Senate, '*Ille non consul est, cui ipse senator non sum.*' He is no King, to whom we are not a House of Parliament. On the other hand, should the representative of the Commons, like that of Denmark, surrender the rights and liberties of the people into the hands of the King, and the King, instead of dissolving the Parliament, should accept the surrender, and attempt to maintain it, contrary to the laws and to the oath of the Crown; or should the two Houses take the power of the militia, the nomination of the Privy Councillors, and the negative in passing laws, out of the Crown, these would be cases tending to dissolution; that is, they are cases which the law will not put, being incapable of distrusting those whom it has invested with the supreme power, or its perpetual duration; and they are out of the reach of laws and stated remedies, because they render the exercise of them precarious and impracticable. This observation may be applied to every similar case which can be found in imagination relative to the several estates; with this difference, that it holds strongest as to the King, in whom both the Common and Statute Laws have reposed the whole executive power: nor could the least branch of it be lodged in the two Houses, for the purpose of providing a judicial remedy against him, unless the Constitution had erected *imperium in imperio*, and were inconsistent and destructive of itself. Should it then be asked, What! has the law provided no remedy in respect of the King? and is the political capacity thus to furnish an exemption in his natural, from being called to account? The law will make no answer, but history will give one. When the King invaded the fundamental

Constitution of the realm, the Convention of Estates declared an abdication, and the Throne vacant. Indeed, the political character, or the King considered as an estate, still subsisted in notion and judgment of law; the right of the people to be governed by a limited monarchy, according to the ancient exercise and distribution of powers between the three estates, remained as much as ever; but the exercise of the government was suspended, which made it a case tending to dissolution."

The proper answer to be given to such questions is, "They are not reasonably or properly to be put," and if they are put, I can only say, that such usurpation of power tends to a dissolution of society. In such a case revolution has begun, and resistance is not rebellion. But, my Lords, wherever there is paramount power, there is some possibility of abuse, and paramount power must subsist somewhere. In a pure despotism, it is in the sovereign. In a limited monarchy the power is distributed in various departments of the State, but in each department it is without any control by the common process of law. The constitution cannot, by anticipation, provide a legal remedy for the act of abuse, as it supposes that power which is conferred for the public good will be constitutionally and beneficially exercised.

But, my Lords, I may, if it were necessary, draw a clear distinction between this order of the House of Commons authorizing a publication of its proceedings, and such an order as has been referred to, namely, a warrant for the execution of a prisoner. The order now under discussion is within the general jurisdiction of the House of Commons. The other would not be so, and might therefore be considered as illegal and void. There is therefore no resemblance between such outrages as have been hypothetically supposed, and a resolution to print papers for general information, which was passed by the unanimous consent of the House, and which has been sanctioned and approved of, and adhered to, by the most

Paramount power must subsist somewhere.

The present order is within the general jurisdiction of the House of Commons.

The cases of abuse supposed, would not be within its general jurisdiction.

eminent men of every party and class in the present House of Commons,

My Lords, these are the objections, as far as I am aware, that have been urged to this power being reposed in the two Houses of Parliament. I say that they are no answer at all to the arguments of expediency and necessity by which the exercise of this power is supported.

I submit to your Lordships, therefore, that it appearing upon this record that the action is brought in respect of an act authorized and commanded by the order of the House of Commons, and for the purpose of reversing that order, the question of Privilege arises directly :—that arising directly, this Court has no jurisdiction whatever over it.—that this Court has only to learn that it was ordered and directed by the House of Commons in the exercise of a Privilege which they claim, and thereupon to give judgment for the Defendants.

II.—My Lords, I now proceed to consider the effect that is to be ascribed to that Resolution of the House of Commons which is set out upon the plea, and which is admitted by the demurrer. It is alleged that it was resolved, declared and adjudged by the House of Commons, “ that the power of publishing such of its Reports, Votes and Proceedings, as it should deem necessary or conducive to the public interest, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it.”

I have to contend, my Lords, that even if this question is supposed to arise incidentally, your Lordships would be bound by that Resolution so set out and admitted on the record. Now, if this be the law, as it is declared by the House of Commons, it is quite clear that the action cannot be maintained, because the resolution asserts, and adjudges, that the power of Parliament, which has been exercised in this particular instance,

Summary of first branch of argument.

Second point.

Even if the question arises incidentally, still upon the record there must be judgment for the Defendants.

Resolution of House of Commons, (31st May, 1837), admitted

on the record, amounts to an adjudication by a Court of exclusive jurisdiction, and therefore Court of Law bound by it.

does belong to the House of Commons, and is essential to the functions of the House of Commons.

If the law of Parliament be as so declared, it is quite clear that the present action cannot be maintained,

because the order by which this Report was published was made in the exercise of a legitimate authority.

There is no traverse of this allegation ; there is no qualification of it ; there is no replication alleging, that the House of Commons have ever decided otherwise, or that the House of Lords have ever decided otherwise. There is neither traverse, nor confession and avoidance ; but there is a simple demurrer, admitting this adjudication on the part of the House of Commons respecting the law of Parliament. That being so, it must be taken for true that such an adjudication took place ; and there having been such an adjudication, unqualified and uncontradicted, I say that if your Lordships were incidentally to take notice of this question (I maintain that it arises directly, but if it were supposed to arise incidentally), your Lordships, as a Court incidentally having cognizance of this question, would be bound by the law laid down by the Court of original jurisdiction thus brought to your notice.

Now, my Lords, it is quite clear that such a Privilege *may* exist.

The Court has no means of informing itself whether or not the Privilege claimed exists.

The Court cannot take upon themselves, *à priori*, to say that there is not such a power vested in the House of Commons. There is nothing absurd in it.

It involves no mathematical, or physical, or moral absurdity, or impossibility. It is not as if it were asserted that a square might be a circle. It is a power that may be conferred, that may have been conferred, and that may exist. Well, then, how can your Lordships, sitting here upon a demurrer, say that it does not exist ? What organs have the Court to discover whether or not the adjudication of the House of Commons be correct ?—whether or not the House does possess the power which is asserted to belong to it ? There being no traverse, no issue joined, no qualification upon the power alleged, how can your Lordships say that it does not exist ? If the Plaintiff meant to deny its existence,

he ought to have replied and raised an issue of fact—instead of demurring. Let me very respectfully ask your Lordships, by what process you will find that this adjudication of a Court of peculiar jurisdiction is erroneous? To prepare for deciding on this demurrer, are your Lordships to search the Journals? Are your Lordships to read the debates? Are you to go through the votes of both Houses of Parliament? Are you to inquire whether this power has ever been exercised? Now, merely looking to the record, this power may have been exercised in a thousand instances. For anything that the Court can know, merely looking to the record, it may go back to the time when printing was first invented; and it may have been a substitute for another mode of publishing to the community that existed before the invention of printing. For anything that your Lordships can tell, looking at the record,—before the separation of the two Houses of Parliament, there may have been a constant, steady, unquestioned power exercised of communicating to the public all the proceedings of Parliament which Parliament thought it was for the public good should be communicated, although accusing individuals of misconduct. This power may have been exercised by the Wittenagemote. How are your Lordships upon demurrer to know that this has not been so? It may be so. It is asserted that this is the Law of Parliament. How can the Court find out that this is not so, and has not always been so? Is it upon

Judicial determinations afford no information as to what are the Privileges of Parliament.

a demurrer in law that your Lordships are to look to see whether this be the fact? It clearly will not do merely to confine yourselves to judicial determinations, for judicial determinations never will tell your Lordships what are the Privileges of Parliament. As

I ventured to observe yesterday, there are many of the most unquestioned and essential Privileges of Parliament that never have been controverted, and upon which, therefore, there is no judicial decision. There being this adjudication set out upon the record and admitted, how is the Court to say that it is erroneous?

My Lords, this is not at all like a declaration of the House of Commons upon a question of Common Law unconnected

This is not a Resolution by the House of Commons upon a question of Common Law, but upon a question of Parliamentary Law,

with Privilege. Such declarations are certainly to be disregarded. If the House of Commons were to come to a resolution respecting the validity of general warrants by a Secretary of State, or on any question of Common Law of which your Lordships are the proper judges, the Court would not notice such resolution, and, if pressed upon them, might treat it with contempt. But this is not a resolution respecting Common Law, of which your Lordships are the interpreters, but it is a resolution respecting Parliamentary Privilege, of which your Lordships have not the means of judging *proprio vigore*.

It is not, to be sure, a judgment between litigating parties in any particular suit; but it is not the less binding for that reason. Your Lordships are aware that there are various instances in which general certificates or findings of the law are regarded as authoritative declarations of the law. There are resolutions of the Judges in Lord Coke's Reports, which are always considered as evidence of the law, and in any Court in which the laws of England would be considered as a foreign law, any resolution of the Judges authoritatively promulgated would be considered as clear evidence of the law. When a custom of trade has been found by a jury, judicial notice is to be taken of it. When the Recorder of London has certified the customs of London, his certificate is received as proof of these customs in all succeeding times. My Lords, why is not the Court to give to this adjudication of a House of Parliament the effect that would be due even to an adjudication or decision of an Ecclesiastical Court, or the Court of Admiralty, or the Court of Exchequer, or any other Court of peculiar jurisdiction?

This may even be considered as a question of foreign law.

This may be regarded as a question of foreign law.

It would strictly be so if the action

If a similar action were brought in Scotland before the Court of Session, or the Sheriff's Court, and there were pleaded in justification an order of the House of Commons, I say that that would raise a question of foreign law, which the Scottish Courts would have to determine. They are to administer



were brought in Scotland.

Where question of foreign law arises, adjudication of foreign court is binding.

the law of Scotland, and not to administer the Law of Parliament. It would be the same as if a question of French law or of Spanish law arose before them. If it arose incidentally, they must determine it in the best way they can. If it arose directly, of course they would inevitably be bound by the decision of the foreign court. But I say this may be con-

sidered as a question of foreign law arising before your Lordships. If an action were brought before the Court of Policy in Guiana for a libel, being a writing published by order of the House of Commons, and the Judges who are sworn to administer the Dutch law were to decide upon it, there can be no doubt that the question of Parliamentary Privilege would then be a question of foreign law. I submit to your Lordships, that even when the same question arises in the Courts of Common Law in England, still this question of Parliamentary Privilege is equally to be considered as a question of foreign law, and that the Court deciding incidentally a question of foreign law, or a question that belongs to another tribunal, is bound (according to innumerable authorities) to follow the law of the court of original jurisdiction.

Now, my Lords, let me suppose an action brought by a Member of Parliament arrested upon an indictment for libel, for being unlawfully imprisoned contrary to Privilege, and the prosecutor now sued, by way of plea should set out the indictment found, and go on to allege, that against prosecution for libel there is no Parliamentary Privilege,—vouching the Resolutions of both Houses of Parliament upon that subject,—and that there should be a demurrer to the plea. Must there not be judgment for the Defendant, without inquiring whether those resolutions are right or wrong?—without inquiring whether Privilege of Parliament does or does not extend to a prosecution for libel?

Independently of any adjudication upon the subject, it is enough at once to entitle me to your judgment, that the record shows the alleged grievance to arise from an act done by the authority of a House of Parliament in the exercise of Privilege; for, the question

of Privilege thus arising directly, you have no jurisdiction to inquire into it. But if the question were supposed to arise *incidentally*, I have proved that I am equally entitled to your judgment, as the law of Parliament respecting the question embodied in the resolution of the 31st of May, is set out upon the record and admitted by the demurrer.

I shall now proceed strictly to examine all the authorities upon the propositions for which I have contended,—and I think I shall be able to demonstrate to your Lordships that they fully support each of those propositions.

Authorities on  
Propositions I  
and II.

I begin with authorities shewing that the Law of Parliamentary Privilege is distinct and separate from the Common Law of England, and therefore is not a law which your Lordships are to administer.

1st. To show that  
the Law of Parlia-  
ment is different  
from the Common  
law.

The earliest authority I am aware of upon this point is in the reign of Richard the Second, after the famous, or rather infamous decision of Tresilian and Belknap, and their companions, on Parliamentary Privilege. When those Judges came to be tried themselves upon an impeachment, a question arose respecting the mode of proceeding—and it was objected that this impeachment against them for their misconduct was not according to the Common Law.

Impeachment of  
C. J. Tresilian,  
&c.  
1. Parl. Hist. 207.  
11 R. 2 (A.D.  
1388.) Declared  
to be by the Law  
of Parliament,  
which Parliament  
alone could ad-  
minister.

“The King commanded the Lords to examine the articles severally, which they did, with great labour and diligence, until the 13th of February. During this interval the Justices, Serjeants and other sages of the law, both of the Realm and of the Civil Law, were charged by the King to give their faithful advice to the Lords of Parliament how they ought to proceed in the said appeal. Who answered, ‘That they well understood the tenor of the said appeal, and affirmed that it was not made nor brought according as the one law or other required.’ Upon which the said Lords of Parliament having taken deliberation and advice, it was by the assent of the King, with their common accord, declared, ‘That in so high a

crime that is laid in this appeal, and which touches the person of the King, and the estates of this realm, and is perpetrated by persons who are Peers thereof, together with others, the cause cannot be tried elsewhere but in Parliament; nor by any other law or Court except that of Parliament.'” The articles were allowed to be contrary to the Common Law, but still the proceeding was to be by the Law of Parliament, “and that it belongs to the Lords of Parliament, and to their free choice and liberty, by ancient custom of Parliament, to be Judges in such cases, and to judge of them by the assent of the King.”

Thus it is in the earliest instance to be found on our records, you have both propositions established, that the Law of Parliament is a peculiar law, and that it belongs to the Houses of Parliament alone to administer it.

My Lords, there is a legislative declaration of the same doctrine by King, Lords and Commons. I will show in an Act of Parliament in the same reign, in the 11th of Richard the Second, a statuteable allowance of this very doctrine; the Act is not printed with the statutes, but it is clearly an Act of Parliament, as your Lordships will see at a single glance.

Stat. 11 R. 2.  
(A.D. 1387.) Co.  
Abr, r, 7

“The Lords Spiritual and Temporal then present claimed as their liberty and franchise, that all great matters moved in that Parliament, or to be moved in any future Parliament, touching Peers of the land, should be discussed and judged by course of Parliament, and not by the civil or common law of the land used in the other lower courts of the kingdom.

3 Parl. Rolls, 244.  
(Cited Atk. Pow.  
Parl. 108. 14  
East, 22.) That  
all matters of  
Parliament should  
be discussed by  
Parliament.

Which claim, liberty, and franchise, the King in full Parliament readily allowed and granted. *Le Roi le voet.*”

A petition of the Houses of Parliament, and the King's assent, constitute an Act of Parliament. In ancient times the substance of the petition was occasionally reduced into a formal act by the Judges; but many Acts of Parliament remain in their original form of petition and answer. Here we have a Parliamentary decla-

ration, that proceedings in Parliament are not to be discussed and judged either by the common law or by the civil law in the inferior courts, but by the law of Parliament in Parliament itself. This, my Lords, has always been considered, although the Lords only are mentioned, to comprehend the Commons. It is only declaratory of what the constitution had always provided, and it extends to all matters transacted in Parliament, which originate in Parliament, or are done by the authority of either House.

I shall next show your Lordships, that invariably the Judges have refused, either when consulted by the House of Lords, or when questions of Privilege have occurred in their own Courts, to

decide upon such questions. The first instance that

Case of the Earls  
of Arundel and  
Devonshire, 27 H.  
6 (A.D. 1448). 13  
Co. Rep. 63  
Cited Atk. Pow.  
Parl. 105. 13 How.  
Stat. Tri. 1427.  
The Judges de-  
clined to give an  
opinion in a mat-  
ter of Parliament.

I have met with upon the subject is one which occurred in the 27th of Henry IV., of which an account is to be found in Lord Coke's Reports, p. 63, and which is cited in Sir Robert Atkyns's argument in *Rex v. Williams*. Lord Coke says,

“The privilege, order, or custom of Parliament, either of the Upper House, or of the House of Commons, belongs to the determination only of the Court of Parliament,” and he then goes on to state what occurred, on the occasion I allude to. “In the 27th year of King Henry VI., there was a controversy moved in the Upper House between the Earls of Arundel and Devonshire, for their seats, places and pre-eminences of the same, to be had in the King's presence, as well in the High Court of Parliament as in his Councils and elsewhere; the King, by the advice of the Lords Spiritual and Temporal, committed the same to certain Lords of Parliament, who for that they had no leisure to examine the same, it pleased the King, by the advice of the Lords at his Parliament, anno 27th of his reign, that the Judges of the land should hear, see and examine the title, &c., and to report what they conceive herein. The Judges made report as followeth: That this matter, namely, of honour and precedence between the two Earls, Lords of Parliament, was a matter of Parliament, and belongs to the King's

Highness and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined."

Sir Robert Atkyns, commenting on this case, observes, "One would think this were a strange answer of the Judges to deny their advice. Were they not assistants to the Lords in matters of law? The true reason of their declining to give their advice is, it was a case above them, and not to be determined by the ordinary rules of law, and therefore out of their element. *Quæ supra nos nihil ad nos*; therefore their answer was, that it was a matter of Parliament, and belonged to the King and Lords, but not to the Judges. This is a resolution of all the Judges in the very point, though this particular case concerned only the Lords, being a matter of precedence between two Lords; yet, as I have proved, the Parliament is one entire body, and are mutually concerned in their powers and Privileges."

Then comes Thorpe's case, which my Learned Friend says I am not to rely upon;—for what reason I know not;—at the time when it arose there was profound tranquility in the country. There was a Parliament sitting; and if the Judges were subject to any influence, or had any bias on their minds, they would have been inclined to give a direct opinion against the Privilege in controversy to please the Duke of York, then Lord of the ascendant, who was eager to crush an enemy of his house. The opinion expressed by Fortescue, C. J., in the name of all the Judges, must be considered their deliberate and calm and solemn judgment. Now Thorpe, who was a Baron of the Exchequer, and Speaker of the House of Commons, and a strong Lancastrian, had been sued by the Duke of York, father of Edward IV., in respect of his having taken some harness or military accoutrements at York. The action was in the Exchequer; there was a judgment against him, and he was imprisoned in the Fleet during the recess of Parliament, he being then Speaker of the House of Commons. When the Parliament met, they were without a Speaker, and they referred the matter to the House of Lords;

Thorpe's case, 31  
H. 6 (A.D. 1452).  
13 Rep. 63. 4  
Inst. 15. 5 Parl.  
Rolls, 227, 239.  
4 Prynne's Writs.  
678. Hakewell,  
125. Atk. Pow.  
Parl. 107. 1 Hat-  
sell, 29. 14 East,  
25.

they had what may be considered a conference with the Upper House to deliberate respecting the mode of proceeding in this emergency, and upon that occasion the Judges were summoned to give their opinion, whether the Privilege of Parliament extended to such a case. The Speaker being imprisoned for damages recovered against him during the recess of the Parliament, the Judges were asked whether, when Parliament met again, he was entitled to be discharged from that imprisonment. "The said Lords Spiritual and Temporal not intending to impeach or hurt the liberties and privileges of them that were coming for the commune of this land to this present Parliament, but legally after the course of law to administer justice, and to have knowledge what the law will weigh in that behalf, opened and declared to the Justices the premises, and asked of them whether the said Thomas ought to be delivered from prison by force and virtue of the Privilege of Parliament or no." The question of Privilege was directly submitted to them. Now, what do they say? "To the whole question, the Chief Justice, in the name of all the Justices, after sad communication and mature deliberation had amongst them, answered and said: That they ought not to answer to that question; for it hath not been used aforetime, that the Justices should in anywise determine the Privilege of this high Court of Parliament; for it is so high and so mighty in its nature, that it may make law, and that that is law it may make no law; and the determination and knowledge of that Privilege belongeth to the Lords of the Parliament, and not to the Justices."

Here is an express authority, that the Judges are incompetent to give any opinion upon a question of Privilege. It has been suggested, that this was merely saying that they were not to determine and decide. My Lords, that is not a just interpretation of the language of the Chief Justice; it never was for a moment supposed that it was referred to them to adjudicate, but only to give an opinion to their Lordships, and that opinion the Judges respectfully refused to give, just as I believe the common law Judges have since more than once refused or declined to give an opinion

Lord Ellenborough's opinion of the effect of this answer, 14 East, 29.

respecting questions of equity. That is the interpretation that is put upon it by Lord Ellenborough, in *Burdett v. Abbot*, where his Lordship says, "Surely the word, 'determine,' was not there meant to be used by them in the sense of 'adjudge,' but they meant to say no more than this: you, the Lords' House, ask our opinion upon a question concerning Privilege of Parliament before you, but we are not to determine that question; that is, we are not to give you any determinate purpose upon that subject. The question was not addressed to them as to persons who were to determine or adjudge upon it, but as advisers to the Lords on the law. They say in effect, it is not a proper subject for us to enter into; it properly belongs to yourselves; and therefore it is not for us to advise you upon it."

The question being put to them to advise the Lords on the law, they decline to give any opinion, and say it was a question with which they were not acquainted, and that it was to be determined upon in Parliament. The Lords acquiesced; but what would the Lords do if the Judges were to refuse to give an opinion when asked upon a question of common law?

The next case upon the subject is *Ferrers'* which occurred in 1543. *Ferrers* was elected Member for Plymouth. In going to the Parliament House he was arrested in London by a process out of the King's Bench, at the suit of one *White*, for the sum of 200 marks, upon a judgment against him as surety for the debt of *Waldon*. The arrest being made known to the Speaker of the House, the Serjeant was ordered to go to the Compter in Bread-street, where *Ferrers* was, and there to demand delivery of the prisoner. The city officers resisted the Serjeant; an affray ensued; the Serjeant was obliged to defend himself, and his mace was broken. The Sheriffs came to the Compter, but they took part with the officers, and the Serjeant was compelled to go without his prisoner. The House being informed of this, there was a conference between them and the Lords, and

*Ferrers' case*, 14 H. 8. (A.D. 1543). 1 Hollingshead, 955. Crompton's Jurisdiction of Courts, 8. Dyer, 275. 1 Hatsell, 53. 14 East, 40. Wynne, Jur. H.C. 8.

the Lords thought that it was a great contempt, but referred the punishment of it to the Commons, whereupon the Serjeant was ordered to go to the Compter and demand the prisoner without writ or warrant. The Commons refused a writ of Privilege, because there was an offer to discharge Ferrers upon a writ of Privilege; but the Commons insisted that they had a right to discharge him by their own authority; that is, by the mace, without any writ of Privilege. Accordingly the prisoner was delivered up to the Serjeant, and then the Sheriffs and the officers of the Compter were summoned before the House; and in the conclusion, the Sheriffs and White were committed to the Tower, and the other inferior officers to other places, where they remained till discharged on their petition and submission; and an Act of Parliament was passed to revive the execution against Waldon, the principal debtor, and to discharge Ferrers.

Speech of the  
King as to the Pri-  
vileges of Parlia-  
ment.

I would refer your Lordships to what was said by the King upon that occasion. “And further, we be informed by our Judges, that we at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head, and you as Members, are conjoined and knit together into one body politic, so as whatsoever offence or injury during that time is offered to the meanest Member of the House, is to be judged as done against our person and the whole Court of Parliament, which prerogative of the Court is so great (as our learned council informeth us), as all acts and processes coming out of any other inferior Courts must for the time cease and give place to the highest.”

Concurrence of  
the Judges in the  
King's declara-  
tion.

The Judges concurred in this declaration, and your Lordships have therefore a declaration by the King, with the concurrence of the Judges, that what was done by either branch of the Parliament is to be considered as done by the whole, and that all other Courts are subordinate to Parliament, and are to yield obedience to the Law of Parliament, as the superior Court shall expound it. The account goes on to say, “whereupon Sir Edward Montague, then Lord Chief



Justice, very gravely declared his opinion, confirming by divers reasons all that the King had said, which was assented unto by all the residue, none speaking to the contrary.

There are various other authorities to the same effect. Lord Coke, in 4th Institute, writes thus: "And as every Court of justice hath laws and customs for its direction, some by the Common Law, some by the Civil and Canon Law, some by peculiar laws and customs, &c., so the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. It is *Lex et consuetudo Parliamenti*, that all weighty matter in any Parliament moved, concerning of the Peers of the Realm, or Commons, in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament, and not by the Civil Law, nor yet by the Common Laws of this realm used in more inferior Courts, which was so declared to be *secundem legem et consuetudinem Parliamenti*, concerning the Peers of the Realm, by the King and all the Lords spiritual and temporal, and the like, *pari ratione*, is for the Commons, for anything moved or done in the House of Commons, and the rather, for that, by another law and custom of Parliament, the King cannot take notice of anything said or done in the House of Commons, but by Report of the House of Commons; and every Member of the Parliament hath a judicial place, and can be no witness; and this is the reason that Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the Common Laws, but *secundem legem et consuetudinem Parliamenti*, and so the Judges in divers Parliaments have confessed, and some hold that every offence committed in any Court, punishable by that Court, must be punished (proceeding criminally) in the same Court, or in some higher, and not in any inferior Court, and the Court of Parliament hath no higher."

Authority of Lord Coke on the Privileges of Parliament.

Lord Coke, therefore, regards the House of Commons as a branch of the Court of Parliament, and considers that this Court has exclusive and peculiar jurisdiction for the administration of that branch of the law.

House of Commons a branch of the Court of Parliament.

My Lords, the books swarm with authorities to the same effect. I will refer your Lordships to what is laid down by Hawkins, "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses, and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice."

Hawkins's Pleas  
of the Crown, b.  
2, c. 15, s. 73.  
As to Privilege of  
Parliament.

What is the opinion upon this subject of the greatest constitutional writer we have, Mr. Justice Blackstone, in his Commentaries? The Privileges of Parliament are likewise very large and indefinite.—Privilege of Parliament was principally established in order to protect its Members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown." Then he goes on to repeat and to sanction what I have before stated as to the practice of the Judges in refusing to give any opinion upon the law of Parliament, with which they are not supposed to be conversant.

1 Black. Com.  
164. As to the  
same subject.

I will now adduce *dicta* of various other eminent Judges to the same effect. These are the words of Chief Justice De Grey, "This Court," namely, the Court of Common Pleas, "cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law, for the law by which the Commons judge of their Privileges is unknown to us." "The counsel at the bar have not cited one case where any Court of this Hall ever determined a matter of Privilege which did not come incidentally before them."

*Dicta* of eminent  
Judges.  
De Grey, C. J., in  
Brass Crosby's  
case (A. D. 1771),  
3 Wils. 199.

p. 202.

p. 203.

"Courts of justice have no cognizance of the acts of the Houses of Parliament, because they belong *ad aliud examen*."

I would wish to draw your Lordships' notice to this *dictum* as extremely important with reference to acts of either House of Parliament. Lord Chief Justice De Grey seems to think that questions of Privilege incidentally arising might be considered by a Court of Common Law; but with regard to acts of either House, he says,

“ Courts of Justice have no cognizance of the acts of the Houses of Parliament, because they belong *ad aliud examen*.”—Now, this action is brought for an act of one of the Houses of Parliament ; therefore it is not *per legem hujus celoci* that it is to be determined.

Mr. Justice Blackstone says, in the same case, “ Holt differed from the other judges in this point ; but we must be governed by the eleven, and not by the single one.”—And in the Aylesbury case there referred to, Mr. Justice Powys says, “ The House of Commons is a great Court, and all things done by them are to be intended to have been *rite acta*.”

Blackstone. J.  
3 Wils. 205.

Powys, J. in Rex  
v. Paty, 3 Anne,  
(A.D. 1704).  
2Ld. Raym. 1109.

Mr. Justice Powys was of rather a different opinion from Chief Justice Herbert, who, upon Williams’s case coming on to be argued, and his counsel having commenced, “ The Court of Parliament——” interrupted by saying, “ Court do you call it ?” upon which Pollixfen, the counsel, sat down, and there was judgment for the Crown.—But, says Mr. Justice Powys, “ The House of Commons is a great Court, and all things done by them are to be intended to have been *rite acta*.” \* \* And in another place he says, “ The House of Commons are a great branch of the Constitution, and are chosen by ourselves, and are our trustees ; and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do anything amiss.—It would be unreasonable to put the Judges upon determining the Privileges of the House of Commons, of which Privileges they have no account, nor any footsteps in their books. The House of Commons have the records of them, and as occasion requires, search them to find them ; but the Judges cannot resort to those records, and therefore it is indeed impossible for them to judge matters of Privilege.”

Mr. Justice Powell, in the same case, says, “ The Commons have also a power of judicature—but not by the Common Law, but by the Law of Parliament, to determine their own Privileges.—The House of Commons are the supreme judges of their own Privileges.—The Court of Parliament is a superior Court to this Court ; and

Powell, J. 2 Ld.  
Raym. 1110, &  
seq.

though the King's Bench have a power to prevent excesses of jurisdiction in Courts, yet they cannot prevent such excesses in Parliament, because that is a superior Court to them, and a prohibition

was never moved for the Parliament."—That learned Judge also said, "The Court may judge of Privilege," meaning incidentally, "but not contrary to the judgment of the House of Commons."

My Lords, I will likewise refer you to what is laid down by Lord Camden in *Entick v. Carrington*. The question was as to the legality of the warrant of the Secretary of State to seize papers, and the warrant was held to be illegal. What says Lord Camden? "The only instance of this kind," that is the power to commit without the power to examine on oath, "the only instance of this kind that can be produced is the practice of the House of Commons, but this instance is no precedent for other cases; the rights of that assembly are original and self-created, they are paramount to our jurisdiction, and above the reach of prohibitions, injunctions, or error."

Lord Chief Baron Comyn says, under the head, "The Law and Usage of Parliament," "The Parliament, *suis propriis legibus et consuetudinibus subsistit*."—"All matters moved concerning the Peers or Commons in Parliament, ought to be determined according to the usage and Customs of Parliament, and not by the law of any inferior Court."

The same doctrine is to be found in the other Abridgments of the Law, with which I will not trouble the Court; but I thought it was material to bring to your notice the high authority of Lord Chief Baron Comyn, who lays down, as broadly as I could wish to state it, the doctrine for which I contend.

In a text Book of considerable authority "on the Law and Customs of the Parliament of England," it is stated, that, "In ancient time the Lords and Commons of the Parliament did sit together in one and the same room; but after-

2 Ld. Raym. 1111.

Lord Camden's opinion in *Entick v. Carrington*, 6 G. 3, (A. D. 1765), 2 Wilson, 275. 19 How. State Tri. 1019, 1047, (where a much fuller report of Lord Camden's judgment is given than in 2 Wilson.

Comyn's Digest, "Parliament," (G. 1.)

wards they were divided, to sit in several rooms, and this was at the request of the Commons, but yet still they remain but one Court ; and of all this I have seen the records, one in the time of Henry I., where all of them did sit together, and mention is there made of the degrees of their seats ; so in the time of Edward III. 39."

In the same book, the author says, " The Parliament hath three powers ; a legislative—in respect of which they are  
 p. 83. called the Three Estates of the Realm ; a judicial—in respect of this it is called *Magna Curia*, or the High Court of Parliament ; a counselling power—hence it is called *Commune concilium regni*.

" The Parliament gives law to the Court of King's Bench, and to all other Courts of the kingdom, and therefore it is absurd and preposterous that it should receive law from it and be subject to it. The greater is not judged of the less.

" All the Courts of Common Law are guided by the rule of the Common Law ; but the proceedings of Parliament are by quite another rule. The matters in Parliament are to be discussed and determined by the custom and usage of Parliament, and the course of Parliament, and neither by the Civil nor the Common Law used in other Courts.

" The Judges of all the Courts of Common Law in Westminster are but assistants and attendants to the High Court of Parliament ; and shall the assistants judge of their superiors ?

" The High Court of Parliament is the *dernier resort*, and this is generally affirmed and held ; but it is not the last, if what they do may yet again be examined and controlled.

" Because the High Court of Parliament proceeds by a law peculiar to that High Court, which is called *Lex et consuetudo Parliamenti* (and not by the rules of the Common Law), and consists in the customs, usages, and course of Parliament, no inferior Court can, for this very reason, judge or determine of what is done in  
 p. 369. Parliament, or by the Parliament." " It doth not belong to the Judges to judge of any Law, Custom, or Privilege of Parliament."

Now, my Lords, having, I hope, shown to your Lordships, by authority, that the Law of Parliament is a separate and distinct law, and that it is to be administered exclusively by those superior Courts called the Houses of Parliament, I will proceed to cite various cases that have come before the Courts of Law, where these principles have been judicially acted upon, and where, it appearing that the act complained of was done by the authority of either House, the question of Privilege has been considered to arise directly, and the Judges have admitted they had no jurisdiction.

Cases in which these principles have been acted on in the Courts.

I will begin, my Lords, with Darnel's case, where a *habeas corpus* was illegally refused, or at least the Judges illegally remanded the person who sued it out, upon a commitment by order of the King in Council. Their conduct upon this occasion was reprobated, and their judgment was reversed; but with regard to writs of *habeas corpus* sued out by persons committed by either House of Parliament, the judgments of the courts refusing to discharge have been always recognised and affirmed.

Darnel's case,  
3 C. 1 (A. D. 1627),  
3 How. State Tr.  
1, cited 14 East.  
66, 124.

In Darnel's case, there was a *habeas corpus* in the King's Bench by Sir Thomas Darnel, Sir John Corbett, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden; they had been committed by the Council Board for resisting a forced loan; the warrant was signed by the Attorney-general, and another of the Council. There being a motion to discharge Darnel, the Attorney-general opposed it; and he says, "this *habeas corpus* was sued out by special command, because these gentlemen gave out in speeches, and in particular this gentleman (that is, Sir Thomas Darnel), that they did wonder why they should be hindered from trial, and what should be the reason their writs were not returned: nay, his Majesty did tell me that they reported that the King did deny them the course of justice, and therefore he commanded me to renew the writ, which I did, and think I may do it *ex-officio*."—This was a commitment by Mr. Attorney-general *ex-officio*, and this is the

reason he assigns upon *habeas corpus* why Sir Thomas Darnel ought not to be set at liberty.

The Judges gave an unanimous opinion that “if a man be committed by command of the King, he is not to be delivered by a *habeas corpus* in this Court; for we cannot inquire into the cause of the commitment;” and at the conclusion of their judgment, the following reasons are assigned: “Mr. Attorney hath told you that the King hath done it, and we trust him in great matters; and he is bound by law, and he bids us proceed by law as we are sworn to do, and so is the King; and we make no doubt but the King, if you seek him, he knowing the cause why you are imprisoned, he will have mercy; but we leave that. If in justice we ought to deliver you, we would do it; but upon these grounds, and these records, and the precedents and resolutions, we cannot deliver you; but you must be remanded.”

They were remanded accordingly, and remained in custody from November to January, when they were released by order of the King in Council; but Parliament soon after met, and reversed what had been done. Sir Robert Phillips who was a Member of that Parliament, speaks of the judgment in this case as “a fatal judgment against the liberty of the subject.”

Sir Edward Coke, who was also a Member of this Parliament, took a part in the debate, and strongly condemned the judgment. The House of Commons passed some important resolutions on the subject, which were transmitted to the Lords; and after a long conference between the two Houses, the Judges who gave the judgment were summoned by the Peers to answer the charges of the House of Commons; and Mr. J. Jones endeavoured to show there was no distinction between a commitment by the King and a commitment by the House of Commons. These discussions ended in the famous Petition of Right, which is a declaratory Act.

My Lords, the 2nd section of the Petition of Right recites,

State Trials, ut  
supra, p. 59.

Sir Edward  
Coke's opinion of  
that judgment.  
Resolutions of  
House of Com-  
mons on the sub-  
ject.  
State Trials, ut  
supra p. 162.

that divers commissions had issued requiring the people to lend money to the King ; “ and many of them, upon their refusal so to do, have had an oath administered unto them, not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance, and to give attendance before your Privy Council and in other places.” And section 4 recites, that “in the 28th year of the reign of King Edward the Third it was declared and enacted, by authority of Parliament, that no man, of what estate or condition he be, should be put out of his lands or tenements, without being brought to answer by due process of law.” Then it goes on to recite this improper decision respecting the *habeas corpus* ; and the petition concludes thus : “ And they do therefore humbly pray of your most excellent Majesty, 1. That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament : 2. And that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof : 3. And that no freeman, in any such manner as is before mentioned, be imprisoned or detained. All which they most humbly pray of your most Excellent Majesty, as their rights and liberties, according to the laws and statutes of this realm ; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example ; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you, according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.”

Petition of Right  
3 C. 1, c. 1.  
(A. D. 1628)  
In effect reverses  
this judgment.

It is worthy of observation, My Lords, that though this decision of a Court of Law, that a commitment by the King in Council was not to be questioned, was denounced

It is established  
that commitments



by Parliament  
are conclusive on  
the Courts.

and reversed by the Petition of Right,—the rule of law is firmly established, that commitments by either House of Parliament are conclusive on the Courts of Westminster Hall.

The cases to which I am now to draw your attention are, where commitments by either House of Parliament have been recognised, and where the Judges said they could not inquire into the merits of such commitments.

There are two cases of this nature, the earliest to be found, upon which no great reliance can be placed, as they occurred during the time of the Republic ; but worth introducing, because it is well known that Cromwell was eager to have justice purely and properly administered. As far as was consistent with his own authority, he was desirous that the law should have its regular course, and he prevailed upon several upright and eminent lawyers to act as his Judges.

Instances.  
Two cases during  
the Common-  
wealth.

Lord C. J. *Denman*.—I do not know that you can state, that Cromwell was so very eager for the pure administration of justice ; he is known to have established Courts of High Commission ; and the couplet you alluded to yesterday and which you supposed to have proceeded from Chief Justice Keling, was uttered by Cromwell. It is stated, in the History of the Rebellion, by Clarendon, that he was constantly interfering ; and when the Judges made allusion to the Great Charter, he gave that answer which you thought proper to apply to a Chief Justice of this Court.

Mr. *Attorney-General*.—My Lord, I believe it will be found, whoever might be the original author of the rhyme on Magna Charta, it was adopted by Keling, though a Chief Justice of this Court, and repeated by him from the Bench. What I said with reference to Cromwell was this, that as far as was consistent with his own power, he manifested an anxiety for a pure administration of justice ; but his own power sometimes required he should establish these Courts of High Commission. Nevertheless, I think all historians are agreed that he was desirous that the law should be

impartially administered, and for that purpose he employed, and was able to obtain the services of Sir Matthew Hale, Chief Justice Rolle, and other most learned and virtuous men.

My Lords, Captain Streater's case is one of the two to which I alluded; he was committed by the authority of the House of Commons, and first sued out a writ of *Habeas Corpus* in the Upper Bench (as this Court was then termed); Parliament was sitting, and he applied to be discharged: Twisden appeared as his counsel. It was allowed he was in custody under two warrants, one by the Council, which was declared to be bad, and if he had not been in custody under the commitment of the House of Commons he would have been immediately discharged. The Judge, who, I believe, was Lord Chief Justice Rolle, addressing the defendant, said, "Mr. Streater, one must be above another, and the inferior must submit to the superior, and in all justice an inferior court cannot control what the Parliament does; if the Parliament should do one thing and we do the contrary here, things would run round; we must submit to the legislative power; for if we should free you, and they commit you again, why here would be no end, and there must be an end in all things. When you say we are not to imprison you without cause shewn, it is true we are not; but if there be any that do disturb the peace of the nation we are to settle things in peace and quietness. Another objection was, that there was no cause expressed; it is true here there is not." (There was no cause expressed in the Parliamentary warrant.) "We are judges of the law, and we may call inferior courts to account why they do imprison this or that man against the known laws of the land, and they must show cause to any man. In this case, if the cause should come before us we cannot examine it, whether it be true or unjust."

Captain Streater's case, A.D. 1653, 5 How. State Trials, 365. Committed under two warrants; one by the Council, and one by the House of Commons.

5 How. State Trials, 386.

Remanded on the warrant by the House.

My Lords, Cromwell's Judge spoke here as he would have spoken had the King been upon the throne. After this, when

5 How. State  
Trials, 391.

the Parliament had been dissolved, Captain Streater sued out another writ of *Habeas Corpus*, still before the Upper Bench, and Twisden, his counsel, gives this reason why he should now be discharged, that “the order of Parliament is out of doors, the Parliament being dissolved.” The Attorney-general contended, that he ought still to be kept in custody, “for, that they ordered that he should not be delivered but by order of Parliament. I conceive he can be delivered no otherwise than by an order of Parliament, nor by any other but a Parliament.” Mr. Attorney says he could only be discharged by Parliament. What says Twisden in answer to that? “My Lord, a Parliament may determine, and Parliaments do determine, and when they do, their orders also determine with them. It is true, that Acts of Parliament do continue, but this is but an order of Parliament, and not

Discharged on dissolution of Parliament.

an Act of Parliament. My Lords, we must come hither to be relieved.” And now, to show that justice was duly administered as it would now be,—as soon as the House was dissolved, and their authority gone, Captain Streater was discharged by the Court.

There is another report of this case in Styles, where it is stated, that “Twisden confessed that this court cannot be judge of the Parliament; but this order by which he is committed differs from an Act of Parliament, for this is temporary and determineth; and although the authority of Parliament ceaseth not, yet a particular Parliament may be dissolved, as this was.” And then, according to that report, Rolle, Chief Justice, says, “We examine not the orders of Parliament; but the question is, whether the order doth now continue, and I conceive it is determined by the dissolution of the Parliament, and so would it have done by prorogation of the Parliament, because there is another Session, and we can judge no otherwise of orders in Parliament, but by the words of them.” Rolle, Chief Justice, who had refused to discharge, or to inquire into the commitment, while Parliament was sitting, holds that Parliament being dissolved, its authority was gone.

Styles, 415.

I think it proper likewise to mention Sir Robert Pye's case,

Sir Robert Pye's case, cited from Ludlow's Memoirs, 5 How. State Trials, 948.

which occurred shortly before the Restoration. In an extract from Ludlow's Memoirs, given in the State Trials, it is said, "So low were the affairs of the Parliament, and their authority so little regarded, even in Westminster Hall, that Sir Robert Pye, who had been committed to the Tower by their order, suing for his habeas corpus at the Upper Bench, and Judge Newdigate demanding of the counsel for the Commonwealth what they had to say that it should not be granted; the counsel answered they had nothing to say against it. Whereupon the judge, though no enemy to monarchy,"—(this judge, my Lords, is known to have been an eminent lawyer and an upright man, who, like Hale, though disapproving of the Protector, was induced to assist in the pure administration of justice; this judge, it is said,)—"ashamed to see them so unfaithful to their trust, replied, that if they had nothing to say, he had; for that Sir Robert Pye being committed by an order of the Parliament, an inferior Court could not discharge him."

This, my Lords, is the declaration of the ancient law of England, and might have been made before the rebellion broke out, and at any time after it had ceased.

But, my Lords, I now come to cases subsequent to the Restoration, when the Government was proceeding in its regular march, and I refer your Lordships to Lord Shaftesbury's case, who, in February, 1677, was committed to the Tower by the House of Lords, under a warrant, which did not specify any offence of which he was guilty; he was committed along with the Earl of Salisbury and Lord Wharton, during pleasure, "for high contempt committed against the House,"

no offence being specified. There being a habeas corpus in this Court, a motion was made to discharge him, and it was contended that the order for the commitment was bad, inasmuch as the general allegation of high contempt was too uncertain, and it ought to have been mentioned; for the Court, it was said, could not judge of the contempt; and there was a long argument that he was entitled to

Lord Shaftesbury's case.  
29 C. 2, A. D.  
1677; 6 How. St. Tr. 1269.  
1 Freem. 153.  
1 Mod. 144;  
3 Keble, 792.  
Committed to the Tower for contempt, by House of Lords.

his discharge. However, he was remanded upon the ground that the Courts could not inquire into what had been done by

Sir Thos. Jones's  
judgment, 6 How.  
State Trials,  
1296.

either House of Parliament. In giving judgment,

Sir Thomas Jones, one of the judges, says, "Such a commitment by an ordinary Court of justice would

have been ill and uncertain, but the cause is different

when it comes before this high Court, to which so much respect has been paid by our predecessors, that they have deferred the determination of doubts conceived on an Act of Parliament until they have received the advice of the Lords; and now, instead thereof, it is demanded of us to control the judgment of all the Peers given on a Member of their own House, and during the continuance of

Distinction be-  
tween *direct* and  
*incidental* pointed  
out.

the same Session. The cases where the Courts of Westminster have taken cognizance of Privilege differ from this case; for in those it was only an in-

cident to the case before them, which was of their cognizance, but the direct point of the matter is now the judgment of the Lords. The course of all Courts ought to be considered, for that is the law of the Court; and it has not been affirmed that the usage of the House of Lords has used to express the matter more particularly on commitments for contempts, and therefore I shall take it to be according to the course of Parliament. It is said that the Judges are assistants to the Lords to inform them of Common Law; but they ought not to judge of any law, custom, or usage of Parliament. The objection as to the continuance of the imprisonment has received a plain answer, for it shall be determined by the pleasure of the King or of the Lords; and if it were otherwise, yet the King could pardon the contempt under the Great Seal, or discharge the imprisonment under the Privy Seal. I shall not say what would be the consequence (as to that imprisonment) if the Session were determined, for that is not the present case; but as the case is, the Court can neither bail nor discharge the Earl."

Then Rainsford, Chief Justice, says, "This Court has no jurisdiction of the cause, and therefore the form of the return is not considerable." (They proceed, your

Rainsford, C. J.

Lordships observe, entirely upon the want of jurisdiction.) “WE OUGHT NOT TO EXTEND OUR JURISDICTION BEYOND ITS DUE LIMITS; and the actions of our ancestors will not warrant us in such an attempt.”

Twisden was absent, but he desired Justice Jones to declare that his opinion was, that the party ought to be remanded;—and accordingly he was remanded, on the sole ground that the Court had no jurisdiction to inquire into what was done by a House of Parliament.

There is no other case that I am aware of on this point till we come to the *Queen v. Paty*. This case, my Lords, may be considered as an extreme one, and therefore, as trying the principle upon which such cases are to be determined. Paty had been committed by the House of Commons for bringing an action which had been held to be maintainable by the House of Lords;—that is to say, the House of Lords had held in a parallel case, that such an action was maintainable. After the determination in *Ashby v. White*, Paty and other men of Aylesbury brought actions against the constables of Aylesbury, upon the ground of their votes having been rejected; they were committed by the House of Commons, and they sued out writs of habeas corpus to be discharged.

*The Queen v. Paty*,  
Hil. 3 Anne,  
A.D. 1703-4,  
2 Ld. Raym.  
1105; Salk. 505;  
Holt, 256.  
Commitment by  
House of Com-  
mons for bringing  
an action held to  
be maintainable  
by the House of  
Lords, against a  
constable for re-  
jecting votes at an  
election.

Now, if there was any case of which the Court could take cognizance of what had been done by the House of Commons, this would have been the case; but it appearing that this was a commitment by the House of Commons, eleven Judges out of twelve were clearly of opinion, that whether the House of Commons were right or wrong in committing, they could not inquire into it, as from a commitment by the House of Commons there could be no discharge by a Court of Law;—and your Lordships will find, by referring to the reasons of the judgment, that it proceeded upon the express ground that they had no jurisdiction. This is to be learned not only from the rea-

soning of the three Judges of the Queen's Bench in pronouncing their judgment, but from the record made up at the conclusion of the report in Lord Raymond, where the *ratio decidendi* is given, and shows the want of jurisdiction. This case so closely applies to the present, that I must quote at some length what then fell from the Judges.

Opinions of the Judges, that they could not interfere.

Gould, J.

Lord Raymond, 1106.

Gould, Justice, says, "The prisoners ought to be remanded; that this was the first habeas corpus that was ever brought by persons committed by the House of Commons that he ever heard or read of, and therefore no such writ having ever been brought before, that is an argument that no such writ lies. He said if this had been a return of a commitment by an inferior Court it had been naught, because it did not set out a sufficient cause of commitment; but this return being a commitment by the House of Commons, which is superior to this Court, it is not reversible for form, and that answers the objections to the form of the commitment. We cannot judge of the Privileges of the House of Commons, but they are to debate them among themselves. He said it was objected that by Magna Charta, c. 29, no man ought to be taken or imprisoned but by the law of the land; but that the answer to this was, that there were several laws in this kingdom, among which was, the *lex parliamenti*, which law, as it is said in the 4 Inst. 15, *ab omnibus est quærenda, a multis ignorata, a paucis cognita*; and that it was uncertain that those words in the statute of Magna Charta were to be restrained to the Common Law. He said the Parliament had law and customs peculiar to itself, and that this was declared to be *secundum legem parliamenti*, and that the Judges ought not to give any answer to questions proposed to them about matters of Privilege, because the Privileges of Parliament are not to be determined by the Common Law." Then he goes on to comment upon Lord Shaftesbury's case, which he says was the first instance of any such attempt, and he adds, "The judgment against Sir John Elliott was reversed in the House of Lords, because matters transacted in Par-

liament are only cognizable there. And so it appears by Prynne's Animad. on 4 Inst. 12. He said the House of Commons were the representatives of the people, and concluded that no habeas corpus would lie."

Then Powys, Justice, having stated what I have before read, goes on to say, adverting to one of the objections, "The cause of commitment is for bringing an action at Common Law; and shall the Commons hinder a man from proceeding at law? Now, in general speaking, that is the only use of Privilege, and the meaning of Privilege is, that it is a Privilege against the Courts of Law; such is the Privilege of Members against suits at law to be brought against them. This objection has been further enforced by remembering the resolutions in the case of Ashby and White." He afterwards observes, that "This Court, which is the supreme ordinary Court of Law, and has a very ample authority to discharge a man committed *per mandatum domini Regis*, has *à fortiori* authority to do it where the commitment is by subjects. But the instance put is of no weight, because such a commitment is not good; for the King is to act by his officers, and when the King sat here it was only *pro pompa*, but the Judges gave the rule." "Then," he says, "the second objection is, that if this Court cannot judge of the commitments of the House of Commons, and such a commitment as this is good, they may stop the whole course of law, and take upon them a despotic power. But this is a very foreign supposition, and what ought not to be said by any Englishman. The House of Commons are a great branch of the constitution, and are chosen by ourselves, and are our trustees; and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do anything amiss."

Powell, Justice, goes on in the same strain. "This Court might judge of Privilege, but not contrary to the judgment of the House of Commons, which we must do in this case if we discharge these prisoners from their imprisonment, which is the only judgment the House of Commons can give upon their determination, that these persons

Powys, J.  
p. 1107.  
Powell, Justice.  
Lord Raymond,  
1110.



had been guilty of a breach of their Privileges." "So here the Court of Parliament," he said, "was a supreme court to this court, and though the King's Bench have a power to prevent excesses of jurisdiction in courts, yet they cannot prevent such excesses in Parliament, because that is a superior court to them, and a prohibition was never moved for to the Parliament." "But if they should discharge these persons that are committed by the House of Commons for a breach of Privilege, this would be to take upon themselves directly to judge of the Privileges of Parliament. This want of jurisdiction in the court cures all the faults in the commitment, though if that were to be debated there ought to be a difference taken between a commitment for a crime and for a contempt."

Lord Holt differed from the rest of the Judges. There is no Judge who ever sat upon the English bench to whom greater respect is due; there was never, I believe, a more learned or upright judge; but he was one against eleven;—his opinion has been constantly overruled from the time that he gave it; and I must say, that, reading his judgment, which I have done again and again with great attention, I cannot find that he lays down any principle upon which his opinion can be supported. He tried to distinguish, but in vain, between that case and the case of Lord Shaftesbury, which he would not overrule. He says, "That the legality of the commitment depended upon the vote recited in the warrant; and, for his part, he thought the prisoners ought to be discharged; though in this opinion he was so unfortunate as to go contrary to the Act of the House of Commons, and the opinion of all the rest of the Judges of England, whose assistance they had desired, and there had been a meeting for that purpose." The reason he assigns is this. "If the votes of both Houses could not make a law, by parity of reason they could not declare a law." Now, with all due respect for the memory of Lord Holt, I think this most illogical; they cannot make the law, but they may declare the law. No court of justice has the legislative power, but every court of

Lord C. J. Holt  
differed from the  
other Judges.

p. 1112.

justice has the right to declare that law with the administration of which it is entrusted.

The reason of the decision of the eleven is to be found in the record at the end of the report in Lord Raymond: “Et super maturâ deliberatione per curiam hic habitâ *pro eo quod videtur curiæ hic quod cognitio causæ captionis et detentionis prædicti Johannis Paty, non pertinet ad curiam dictæ dominæ reginæ coram ipsâ reginâ*, ideo idem Johannes remittitur præfato custodi goalæ dictæ dominæ reginæ de Newgate, remanere in statu quo fuit tempore emanationis brevis prædicti.” What is the reason? “Quod cognitio causæ captionis et detentionis prædicti Johannis Paty non pertinet ad curiam dictæ dominæ reginæ.” It was, that the cause of the caption and detention of Paty, for the want of jurisdiction, could not be examined in the Court of Queen’s Bench, because the commitment was the act of one of the Houses of Parliament. This record was made up by the advice of all the Judges; and the reason of the judgment so expressed has not, I believe, been before noticed in discussions upon this subject.

My Lords, I will next call your attention to Murray’s case. He was committed to Newgate by the House of Commons for a contempt, but the contempt is not specified in the warrant. He was brought up before the Court of King’s Bench and remanded; and these are the reasons given by the Judges:

Murray’s case,  
24 Geo. 1, A. D.  
1731, 1 Wils. 299.  
Committed to  
Newgate by the  
House of Com-  
mons for con-  
tempt generally.  
Opinions of the  
Judges.  
Wright, J.

“Wright, Justice. It appears upon the return of this *habeas corpus*, that Mr. Murray is committed to Newgate by the House of Commons, ‘for an high and dangerous contempt of the Privileges of that House;’ and it is now insisted upon at the bar that this is aailable case, within the meaning of the *Habeas Corpus* Act. To this I answer, that it has been determined by all the Judges to the contrary; that it could never be the intent of that statute to give a Judge at his chamber, or this court, power to judge of the Privileges of the House of Commons. The House of Commons is undoubtedly an high

court ; and it is agreed on all hands that they have power to judge of their own Privileges. It need not appear to us what the contempt was, for if it did appear we could not judge thereof. Lord Shaftesbury was committed for a contempt of the House ; and, being brought here by an *habeas corpus*, the Court remanded him ; and no case has been cited wherever this Court interposed. The House of Commons is superior to this Court in this particular. This Court cannot admit to bail a person committed for a contempt in any other court in Westminster Hall."

Denison, Justice, said, " This Court has no jurisdiction in the present case. We granted the *habeas corpus*, not knowing what the commitment was ; but now it appears to be for a contempt of the Privileges of the House of Commons. What those privileges (of either House) are we do not know, nor need they tell us what the contempt was, because we cannot judge of it ; for I must call this Court inferior to the House of Commons with respect to judging of their privileges and contempts against them. I give my judgment so suddenly, because I think it a clear case, and requires no time for consideration.

That great judge, Justice Foster, agreed, saying that " the law of Parliament is part of the law of the land." The same reasons are given in Murray's case, as in Paty's case, viz., that it was not within the jurisdiction of this Court to inquire into the Privileges of Parliament.

In Brass Crosby's case, the Lord Mayor of London, acting judicially, had committed a person for a supposed trespass. The commitment was considered a breach of the Privilege of the House, because the person committed was an officer of the House, and the Lord Mayor was committed by the House of Commons to the Tower of London ; he was brought up by *habeas corpus*, and the case was very learnedly argued by Mr. Serjeant Glyn and Mr. Serjeant Jephson ; but he was remanded ; and on what ground?

Brass Crosby's case,  
19 How. State Trials, 1137:  
3 Wils. 188,  
2 W. Black, 754,  
11 Geo. 3,  
A. D. 1771.  
Opinions of the Judges.  
De Grey, L. C. J., p. 198.

Lord Chief Justice de Gray says, "If either myself or any of my brothers on the bench had any doubts on this case, we should certainly have taken some time to consider." But he goes on to show, that according to all the authorities the Court had no jurisdiction. In Sir J. Paston's case, 13th Report, there is a case cited from the Year Book, where it is held that every court shall determine of the privilege of that Court;" so that in reality in this case the House of Commons claims no more than the inferior courts have claimed and possessed, and enjoyed. His Lordship goes on to say, "Besides, the rule is, that the Court of Remedy must judge by the same [law] as the Court which commits. Now this Court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law, for the law by which the Commons judge of their Privileges is unknown to us. How then can we do anything in the present case, when the law, by which the Lord Mayor is committed, is different from the law by which he seeks to be relieved. He is committed by the Law of Parliament, and yet he would have redress from the Common Law. The Law of Parliament is only known to Parliament men by experience in the House. The House of Commons only know how to act within their own limits. We are not a Court of Appeal; we do not know certainly the jurisdiction of the House of Commons. We cannot judge of the laws and Privileges of the House, because we have no knowledge of those laws and Privileges. We cannot judge of the contempts thereof; we cannot judge of the punishment." "Again, if we could determine upon the contempts of any other Court, so might the other Courts of Westminster Hall. There are two sorts of Privilege, which ought never to be confounded, personal Privilege, and the Privilege belonging to the whole collective body of that assembly. For instance, it is the Privilege of every individual Member not to be arrested." "Courts of justice have no cognizance of the acts of the Houses of Parliament, because they belong *ad aliud examen*." Upon this judgment the Lord Mayor was remanded. My Lords, the report of this case sets out at length the

Gould, J., p. 203;  
Blackst, J. p.  
204;  
Nares, J. p. 205.

opinions of the other Judges ; I would merely refer to these opinions ; they are expressed as strongly as any terms in the English language can furnish, to show that the Courts have no jurisdiction over anything done by Parliament.

Oliver's case,  
2 W. Black. 758.  
Committed with  
the Lord Mayor,

Next comes Oliver's case. He was committed at the same time with the Lord Mayor, whose case I have just examined, and he applied to the Court of Exchequer to be discharged upon a writ of *habeas corpus*. He thought that another Court might come to a different conclusion ; but, my Lords, in that case the Court of Exchequer confirmed the judgment of the King's Bench, and held that Oliver was not entitled to be discharged any more than the Lord Mayor. Accordingly he was remanded, as it is expressed in the Report, " by the unanimous opinion of all the Barons." And, my Lords, it is a tribute due to those Judges to remind your Lordships, that at that time of day the popular opinion was very strong against the House of Commons. The House of Commons had incurred very great odium by the commitment of Crosby and Oliver. If Lord Chief Justice De Grey and the other Judges had interposed and discharged the prisoners, although posterity might have condemned them, they certainly would at the time have been applauded to the echo. They, however, virtuously withstood the temptation ; and adhering to established principles held that they had no jurisdiction to review or correct what had been done by either House of Parliament. They would not extend their jurisdiction beyond its due limits.

Flower's case,  
8 T. R. 314,  
39 Geo. 3,  
A. D. 1799,  
Committed to  
Newgate by the  
House of Lords  
for libel,  
Lord Kenyon's  
judgment, p. 323.

My Lords, the next case in this class is Flower's which occurred in the time of Lord Kenyon. He was committed to Newgate under the order of the House of Lords, by which he was fined 100*l.* and ordered to be imprisoned for six months, for a libel in the Cambridge Intelligencer on the Bishop of Llandaff. He brought a writ of *habeas corpus* returnable in this Court. I strongly rely upon the judgment of Lord Kenyon. Without fatiguing you by going

through it, I would merely state, that he refers to the prior cases of commitment by the Houses of Lords and Commons ; he entirely adopts and approves of them, and says that the Court had no jurisdiction. Mr. Justice Grose says, “ When the House of Commons adjudge any thing to be a contempt or a breach of Privilege, their adjudication is a conviction, and their commitment in consequence is execution, and no Court can discharge or bail a person that is in execution by the judgment of any other court ; every court must be sole judge of its own contempts. The counsel at the bar have not cited any one case where any court of this hall ever determined a matter of Privilege which did not come incidentally before them.” The prisoner was remanded.

Sir John Hobhouse’s case is the last. Sir John had been committed by the House of Commons ; he sued out a writ of *habeas corpus* returnable in this Court. The ground of his application was stated by himself, that the House of Commons not having authority to commit him, this Court ought to take cognizance of the matter, and that he ought to be set at large. This case occurred in the time of a Judge inferior in learning to none of his predecessors, Lord Chief Justice Abbott. He says, “ Having conferred together upon this case, we are clearly of opinion that sitting in this Court we are not authorized to enter into the discussion of any of the objections taken by the gentleman on the floor to this commitment. It has been settled by many precedents brought from time to time before the different courts of Westminster Hall, and finally, in the case of Sir Francis Burdett *v.* Abbot, which went by writ of error to the Exchequer Chamber from this court, and ultimately to the House of Lords, that it is competent for the House of Commons to commit for a contempt of their Privileges. The cases of Lord Shaftesbury and Rex *v.* Paty are decisive authorities to show ” (here is the doctrine laid down by Lord Chief Justice Abbott), “ that the courts of Westminster Hall

Sir J. Hobhouse’s case.

2 Chit. Rep. 207.

3 Barn. & Ald. 420.

60 Geo. 3, and 1 Geo. 4,

A. D. 1820.

Committed to Newgate by the House of Commons for a libel.

Ld. C. J. Abbot’s judgment, p. 210,

cannot judge of any law, custom, or usage of Parliament, and consequently they cannot discharge a person committed for a contempt of Parliament. The power of commitment for contempt is incident to every court of justice, and more especially it belongs to the high court of Parliament, and therefore it is incompetent for this court to question the Privileges of the House of Commons, on a commitment for an offence which they have adjudged to be a contempt of those Privileges." He, therefore, my Lords, disclaims all jurisdiction ; and on what ground ? It is on the ground that the jurisdiction belongs to the high Court of Parliament, (the House of Commons being the branch of that high Court whose judgment was then pronounced conclusive), and, accordingly, Sir John Hobhouse was remanded to the custody from which he came.

Now, my Lords, here is a long course of precedents during two centuries, where the same doctrine has been laid down and acted upon by all the courts in Westminster Hall.

It has likewise been decided, that where there has been a commitment and discharge by a *Habeas Corpus*, no action will lie. I alluded to that point yesterday, in consequence of a remark from my Lord Denman.

My Lords, in Bushell's case there was a commitment by the Court of Oyer and Terminer at the Old Bailey. There was a *Habeas Corpus* from the Court of Common Pleas to the Sheriff of London to bring up the body of Bushell, who, with other jurymen, had found a verdict of *not guilty* in favour of certain parties charged with a riot ; the jurymen had been fined and imprisoned on the ground that the verdict was contrary to full and manifest evidence ; there was an order that Bushell should be committed to Newgate, there to remain till he had paid a fine of forty marks. Lord Chief Justice Vaughan says, " the return charging the prisoner with having acquitted Penn and Meade against full and manifest evidence, without saying, that he believed the evidence to be full and manifest, is no cause of fine and imprisonment, and accordingly he was discharged ; then an action is

No action where commitment by court and discharge by *Habeas Corpus*. Bushell's case, Vaughan, 135, 22 Car. 2. A.D. 1669.

1 Mod. 119, 184,  
2 Jones, 13, 3  
Keb. 322, Freem.  
1, 26 Car. 2, A.D.  
1673.

brought against the Lord Mayor, and those who had signed the commitment. My Lords, you will find it laid down by the whole Court that no such action could be maintained. I will content myself with referring your Lordships to the opinions of the other

Ld. C. J. Hale's  
opinion. 1 Mod.  
119.

Judges, and will merely read what was said by Lord Chief Justice Hale :—" I speak my mind plainly, that an action will not lie ; for a *certiorari* and an *Habeas Corpus*, whereby the body and proceedings are removed hither, are in the nature of a writ of error ; and in case of an erroneous judgment given by a Judge, which is reversed by a writ of error, shall the party have an action for false imprisonment against the Judge ?—No ; nor against the officer neither. The *Habeas Corpus* and writ of error, though it doth make void the judgment, it doth not make the awarding of the process void to that purpose, and the matter was done in a course of justice ; they will have but a cold business of it." He denies any distinction on such a case between the officer and the Judge ; and his language shews, that there is no distinction in this respect between the Speaker and the printer of the House of Commons.

I now proceed, my Lords, to mention some cases of Privilege, showing that where the act complained of is done by the authority of the House of Commons, no action can be maintained, and the authority is a bar to further inquiry.

Cases to show that  
no action would  
lie for acts done  
directly by either  
House.

Tash's case, 1  
Hats. 190, A.D.  
1603. Committed  
for an insult to a  
Member.

I first beg leave to refer your Lordships to Tash's case. It is thus narrated in Hatsell : " On the 19th of March, 1603, complaint is made of Bryan Tash, a yeoman of his Majesty's guard, who, on the House of Commons going into the House of Lords, stopped Sir Herbert Croft, and shut the door upon him, saying, ' Goodman burgess, you come not here.' " Some debate arose how the House ought to proceed ; but, on the 22nd, he is committed to the serjeant, and on the 23rd he is brought in custody to the bar, and on his submission and confession of his default is discharged, with a warning from the Speaker, and paying his fees."



Now, suppose Tash had brought his action for being so taken into custody, and there had been a justification,—it is quite clear, that the question would have arisen directly ;—and would this Court have entertained the question as to whether he could be lawfully arrested under the authority of the House? Suppose the serjeant takes into custody a man who attempts to enter the House, or makes a disturbance in the lobby, and an action is brought, and a justification is pleaded under the Sessional Order by which the serjeant is to take all persons into custody who obstruct the passages, would your Lordships consider whether the House had the authority to make such an order to take all such persons into custody?

Cases of commitment without previous adjudication. Williams' case, 1 Hats. 92, A.D. 1575, Committed for striking a Member.

I would next refer your Lordships to instances of the serjeant acting by order of the House, in taking persons into custody without any previous complaint and adjudication. On the 29th February, 1575, Mr. Bainebrigg, complains that one Williams had assaulted and threatened him, upon which the serjeant is ordered to go directly for the said Williams, that he may answer to the House of such matters as shall be objected against him; and the same day, Williams being brought to the bar, and confessing that he did strike Mr. Bainebrigg, it is ordered, "That he do remain in the serjeant's ward till the order of the House be further known to-morrow." He is then taken into custody without any previous warrant or adjudication.

Case of Mr. Coke's servant, 1 Hats. 112, A.D. 1601. A party who had arrested the servant of a Member committed.

A similar case, my Lords, occurs on the 7th of November, 1601. "A servant of Mr. Coke, a Member, being arrested on a bill of Middlesex, the serjeant was sent to Newgate to bring the prisoner immediately to the House; and on his being brought to the bar, with his keeper attending him, he is, by order of the House, discharged from his said keeper and from his said imprisonment, and Robinson, the party at whose suit he was arrested, was brought by the serjeant to the bar, and being reprimanded was discharged, paying his fees."

If an action had been brought against the serjeant for any of those acts, and he had justified under the order of the House, the question would have arisen directly, though there had been no previous conviction, or specific order against the plaintiff,—and the question would have been, according to the authorities I have cited, whether there was such Privilege to take the party into custody? So here, my Lords, an action is brought for what had been done under a general order given by the House of Commons, and there is just as little reason for saying that you should inquire into the power or privilege of the House of Commons to issue that order, as to say you could inquire into whether there was a power, on the part of the House of Commons, to order the serjeant to take the man into custody who had obstructed the access to the House.

I now come to a class of cases, which show that wherever there are courts of exclusive jurisdiction, whatever is decided by them is binding and conclusive on all the world; and that wherever incidentally, in another court, any question arises on which they have peculiar jurisdiction, the court where the question arises incidentally is bound by the opinion of the court of original jurisdiction. Moreover, I shall cite a class of cases under this head, to show that a court of peculiar jurisdiction has power to prevent questions that ought to be decided by it, from coming for decision before any other tribunal whatever.

Cases that show the decision of courts of exclusive jurisdiction is binding in other courts.

Courts of exclusive jurisdiction have interposed to prevent other courts from interfering.

First, how has the question of *prize or no prize* been dealt with? it cannot be tried at the common law; it must be tried in the Court of Admiralty; because international law is different from the common law, and the administration of that branch of the law being assigned to the Court of Admiralty, that court alone has jurisdiction over it.\*

Questions of prize or no prize cannot be entertained by a court of common law.

\* In Mr. Gurney's short hand notes of the argument, there occurs at this place the following statement. "The Attorney-general here complained of indisposition, and said it would be a

In *Mitchell v. Lord Rodney*, this rule was acted upon. That was an action of trover for goods by a British subject against another British subject. There was a plea of not guilty, and the special verdict stated, that the goods were taken upon the surrender of the island of St. Eustatius, as enemies' property, and that there was a suit depending in the Court of Admiralty for condemning them, and that they had been sold pending that suit. The plaintiff contended, that in point of fact, they were not enemies' property, but that they were the property of an English subject, and that they had been wrongfully sold and converted. My Lords, there was judgment for the defendant upon the ground, that this being a question of prize, it could not be entertained by a Court of Common Law. A writ of error was brought, and by the unanimous opinion of the Judges, the judgment was affirmed. The case was powerfully argued for the plaintiff by Kenyon, Wilson, Pigot, and Wood, that this question between British subjects ought to be entertained by Courts of Common Law; but as it depended upon the question of prize or no prize, it was held that the action could not be supported.

*Mitchell v. Lord Rodney*, 2 Br. P. C. 423, A.D. 1783.

In *Home v. Lord Camden*, the Court of Common Pleas granted a prohibition to the Lords Commissioners of Appeal from the Court of Admiralty, with respect to certain property taken as prize and sought to be distributed according to Act of Parliament. The Appeal Court had issued a monition to an agent to bring in the proceeds, and the monition was supposed to be contrary to the legal

*Home v. Lord Camden*, 1. H. Black, 476, 30 Geo. 3, A.D. 1790.

*great accommodation to him to be allowed to proceed disencumbered of a part of his professional costume.*

Lord C. J. Denman.—I should be delighted to see you without it.

Mr. Attorney-general.—I consider it a very great kindness.

Lord C. J. Denman.—We shall consider it a very sufficient apology for departing from anything we may consider the custom of the Court.

*The Attorney-general having retired, returned in a short time without his wig, and addressed the Court so disencumbered, this and the following day."*

vested rights of the officers and crews of the squadron which made the capture. Now here was a prohibition granted by the Common Pleas, and if it had been rightly granted it would be a departure from the rule, that no question connected with prize or no prize

may be brought into a court of common law;

Judgment of C. P.  
reversed by K. B.  
4 T. R. 382, 32,  
Geo. 3, A.D. 1791.  
Judgment of K.B.  
affirmed by H. L.  
2 H. Black. 533.  
6 Bro. P. C. 203,  
A.D. 1795.

but, upon a writ of error, that judgment was reversed in the King's Bench; and upon a writ of error in the House of Lords, the judgment of this Court, reversing the judgment of the Court of Common Pleas, was affirmed. Your Lordships see this

is a very strong case of exclusive jurisdiction, the action being for property claimed by a British subject, and sold by the Defendant, the sale, if unlawful, being a tortuous conversion; but as it was seized as prize, the decision was, that the question whether it was rightly sold, could not be tried in a court of common law.

A still stronger case is that of *Le Caux v. Eden*. That was an

*Le Caux v. Eden*,  
Doug. 594,  
21 G. 3, A. D.  
1781.

action of trespass and false imprisonment, by one of the crew of a ship taken as prize by a privateer, and it was held that the action did not lie, the ship having been taken as prize and released by the

Court of Admiralty. There, my Lords, it was strongly urged that the plaintiff was no party to the suit in the Admiralty; that in the Admiralty they give damages to the owner of the captured ship, if it is wrongfully captured; but those damages go to the owner, and are not distributed among the crew; and the crew have no remedy where there is an illegal capture except by an action at Common Law. But nevertheless it was held that the action could not be maintained, because it raised the question whether the capture was

p. 601.

legal or illegal? In that case Mr. Justice Ashhurst says, "Where the Court of Admiralty has jurisdiction

over the original matter, it ought also to have jurisdiction over everything necessarily incidental." Mr. Justice Buller cited numerous

p. 612.

authorities, and quoted Lord Chief Justice Lee, as having said, "that the reason the jurisdiction

was confined to the Admiralty was, because the question depended on the law of nations, and not on the particular municipal law of any country. The question in such action is, prize or no prize ; if prize, there is no false imprisonment, and that is a question we cannot decide ; and though the ship may be acquitted, the subsequent matter is not triable at Common Law."

So, my Lords, in the judgment given by Lord Mansfield, in *Lindo v. Rodney*, his Lordship says, "The nature of the action being prize or no prize, which not only authorizes the Prize Court, but excludes the Common Law, the Common Law cannot entertain or give any opinion where there is a question arising that is properly referable to a Court of peculiar jurisdiction."

*Lindo v. Lord Rodney*,  
Doug. 613, n.  
22 Geo. 3,  
A.D. 1781.

Wherever there has been any decision of such questions, the decision is binding upon all other Courts. The judgment of a foreign court of prize, professing to be guided by the law of nations, during war in an enemy's country, is held to be binding in all Courts, even as to the facts that are found in the judgment. In *Gayer v. Aguilar*, where that point was decided, Lawrence, Justice, says, "If we could have examined the grounds on which the French courts determined this to be enemy's property, probably we should have formed a different conclusion ; but we cannot review those judgments here. They have decided the question, though by no means according to my opinion ; but having so decided, the rule undoubtedly is, that whenever a Court of competent jurisdiction has decided any question, and the same question arises incidentally in another Court, the latter is concluded by the former judgment."

Decision of Foreign Courts.

*Gayer v. Aguilar*,  
7 T. R. 681,  
38 Geo 3,  
A. D. 1798.  
p. 697.

Decision of a Foreign Court on a warranty of neutrality, conclusive evidence.

In *Hughes v. Cornelius*, which was an action of trover for a ship and goods, a special verdict was found, setting forth a sentence in the Admiralty Court in France in favour of the defendant,—and *per curiam* agreed and adjudged, that as we are to take notice of a sentence in the Admiralty here, so ought

2 Show. 232.

we of those abroad in other nations ; and we must not set them at large again ; for otherwise the merchants would be in a pleasant condition ; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this ? (The courts abroad are to be governed by our decisions as we are by theirs, on the principle of reciprocity.) “ It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars.”

There is a long string of cases to the same effect during the late war. In many of these the decisions of foreign Courts of Admiralty were thought to be most unjust and outrageous ; still they were deemed conclusive and binding, because to such a forum exclusively such a question is remitted.

The same doctrine prevails with respect to Municipal Courts. I will give a few instances. In *Bouchier v. Taylor*, the sentence of the Ecclesiastical Court, in granting letters of administration, was held conclusive in a Court of Common Law. In *Martin v. Welsford*, after judgment upon an information of seizure, it was held that the property is altered thereby, so that neither trover nor trespass will lie for him who was the owner. So also, my Lords, in *Fuller v. Fotch*, the judgment of the Court of Commissioners of Excise was held conclusive in an action against the officer. There, an action of trespass was brought against the officer for seizing goods, and the judgment of the Court of Exchequer condemning the goods was decided to be conclusive evidence that they were lawfully seized.

In *Prudham v. Phillips*, the sentence of the Ecclesiastical Court annulling a marriage was held conclusive, and the party to the suit in the Ecclesiastical Court was not permitted to show it was obtained by fraud. Where a stranger says it was obtained by fraud, he shall be permitted to say so ; as against the party who brings forward the sentence of the Ecclesiastical Court, it may be shown

Judgments of  
Municipal Courts  
held conclusive.

*Bouchier v. Taylor*, 4 Br. P. C.  
708, A. D. 1776.

*Martin v. Welsford*, Carth. 323,  
6 W. and M.  
A. D. 1693.

*Fuller v. Fotch*,  
Carth. 3:3,  
Holt, 287,  
7 Wil. 3,  
A. D. 1694.

*Prudham v. Phillips*,  
Amb. 763,  
2 Strange, 961, in  
margin.  
11 Geo. 2, A. D.  
1737.

Duchess of  
Kingston's case,  
20 How. Sta. Tri.  
355;  
Amb. 756.  
A. D. 1775.

to have been obtained by fraud, as was done in the case of the Duchess of Kingston; but the party to the suit in the Ecclesiastical Court shall not be allowed to say that he was guilty of collusion, and that the sentence was obtained by fraud, in which he participated. In *Prudham v. Phillips*, the question was whether the defendant was liable to be sued as a *femme sole*; she appears to have pleaded coverture, and to have relied on a marriage with a man

C. J. Willes's  
judgment.

of the name of Muilman. In this case it is stated that, "Willes, Chief Justice, after much debate, took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to aver that it is fraudulent, and the case of one who is party to the proceedings. If he plead the judgment was fraudulent, he cannot give evidence of it, but must apply to the Court which pronounced the sentence to vacate the judgment; and if both parties colluded, it was never known that either of them could vacate it."

De Costa v. Villareal,  
2 Strange, 961,  
7 Gev. 2, A. D.  
1733

Decree of the Ecclesiastical Court conclusive in an action for breach of promise of marriage.

The same doctrine is to be found laid down in the case of *De Costa v. Villareal*, "which was an action upon a contract of marriage *per verba de futuro* brought by the gentleman against the lady, who pleaded *non assumpsit*. When the plaintiff had opened his case, the defendant offered in evidence a sentence of the Spiritual Court in a cause of contract where the Judge had pronounced against the suit for a solemnization in the face of the Church, and declared Mrs. Villareal free from all contract; and the Chief Justice held this to be proper and conclusive evidence on *non assumpsit* that it was a cause within their jurisdiction, though the contract was *per verba de futuro*, and though the suit there is *diverso intuitu*, being for a specific performance as far as admonition will go, and this for damages." Here is an action for breach of promise of marriage; the defendant gives in evidence the decree in the Ecclesiastical Court, by which it was held that no such contract had been entered into; and that decree of the Ecclesiastical

Court was held conclusive in this action for breach of promise of marriage.

Another very strong case is *Scott v. Shearman*, in which there was a condemnation of goods in the Exchequer ; and it was held to be so conclusive, and so to alter the property, that trespass would not lie against the officers who seized the goods. An action of trespass was brought against the custom-house officers for breaking and entering the plaintiff's house and taking his goods ; the defendants gave in evidence a copy of the record of the condemnation of the goods in the Court of Exchequer. Blackstone, Justice, at first inclined to think that the question might be entertained, but, upon further consideration, he and the whole Court agreed that the sentence of condemnation in the Court of Exchequer, though it was a proceeding *in rem* and not between these parties, was conclusive. So in the case of *Cook v. Sholl*, which was an action of trover for pipes of wine,—the defendant had seized the pipes of wine for want of a permit, and being the seizing officer, had proceeded for the seizure in the Court of Exchequer, where there was an acquittal ; and here the judgment of the Court of Exchequer was held to be conclusive, exactly as where there was a condemnation. The record of acquittal was read in evidence ; the defendant still insisted that the seizure was lawful, and that the permit had expired before the seizure ; but Lord Kenyon said, “ That he conceived that the judgment of acquittal in the Exchequer which was given in evidence, being a judgment *in rem*, was conclusive as to the question of illegality in the seizure, and precluded all reasoning upon the construction of the permit. And however he might doubt whether that Court had put a true construction upon the effect of the instrument in respect to the time of its operation, yet he could not help thinking that the judgment of acquittal was conclusive as to the illegality of the seizure, which was the subject of the present action. That it seemed to be taken for granted in a case in this Court in Lord

*Scott v. Shearman*,  
2 W. Black. 977,  
15 Geo. 3, A. D.  
1774.

Sentence of condemnation in the Exchequer conclusive.

*Cook v. Sholl*,  
5 T. R. 255,  
33 Geo. 3, A.D.  
1792.

So, judgment of acquittal in the Exchequer.



Mansfield's time, that a judgment of condemnation *in rem* was conclusive between the parties."

The doctrine I am now contending for is powerfully illustrated by the case of *Brittain v. Kinnaird*, which I think well deserving your Lordships' consideration, particularly as containing a most valuable judgment of Mr. Justice Richardson, which must make all who

*Brittain v. Kinnaird*, 1 Brod. & Bing. 432. 60 Geo. 3. A.D. 1819.

read it deeply lament that he was so soon withdrawn from the discharge of his judicial functions. There it was held, that "in an action of trespass against magistrates for taking and detaining a vessel, a conviction under the Bumboat Act (no defect appearing on the face of the conviction) is conclusive evidence that the vessel in question is a boat within the meaning of the Act, and properly condemned." Mr. Justice Rich-

Judgment of Richardson, J.

ardson observed, that "he agreed with the rest of the Court, that they could not enter into the question upon this action of trespass, whether the case came within the Act or not, that question having been decided by the magistrate; Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case of a conviction under the Game Laws for having partridges in possession, could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged in that case that the magistrate had no jurisdiction, unless the bird were a partridge, as it may be urged in the present case, that he has none, unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so, after the conviction had found that the offender kept a dog of that description, could he in a civil action be allowed to dispute the truth of the conviction?" Dallas,

Dallas, C. J. p. 438.

C. J., says, "Extreme cases have been put, as of a

magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it ;”—the conviction must be taken to be legal, because this was a matter that the law had referred to a peculiar tribunal.

I might likewise mention *Hart v. Macnamara*, cited in the *King v. Horton*, in both of which cases it was held, that a condemnation of rum as adulterated, was conclusive evidence of the adulteration in an action for the price.

*Hart v. M'Namara*, 4 Price, 154, n. A.D. 1817.

Where question comes incidentally before a Court, not of original jurisdiction, it is bound by the law of the court of original jurisdiction.

*Juxon v. Byron*, 2 Lev. 64; 2 Salk. 537; 24 Car. 2, A.D. 1671.

held, that wherever incidentally a question comes before a court which has not original jurisdiction upon the question, that court incidentally deciding the original question is bound by the law of the court of jurisdiction.

In *Juxon v. Byron*, the rule is thus laid down by Lord Chief Justice Hale and the whole Court, “That the Spiritual Court, though they may try matters cognizable at common law, which fall in incidentally where the principle is ecclesiastical, yet they shall be prohibited if they proceed in the trial of such incidental temporal matter otherwise than the common law would.” Now, my Lord, I wish to apply this case to the action at bar. According to that rule, if this were a question incidentally arising, you would be bound by the opinion of the court to which it is primarily referred.

In *Shotter v. Friend*, the same rule is acted upon. “An executor being sued for a legacy in the Spiritual Court, pleaded payment, and offered to prove it by one witness, which the Judge refused, and gave sentence against him.” (Because in the Ecclesiastical Court, according to the civil law, two witnesses were required.) “Upon this matter suggested, a prohibition was moved for; *et per curiam*, where the Ecclesiastical Court proceed in a matter merely spiritual, if they proceed in their own man-

*Shotter v. Friend*, 2 Salk. 547; 1 Show. 158, 172; 1 Will. & M. A.D. 1689.

ner, though that is different from the common law, no prohibition lies. Where they have cognizance of the original matter, and an incident happens, which is of temporal cognizance or triable by the common law, they shall try the incident, but they must try it as the common law would. So in the case at bar they shall try the matter of payment or no payment, but then they must admit such proof as the common law would, and so the prohibition was granted."

State the converse of this : in a court not of common law jurisdiction, if a common law question arises incidentally, that court is bound to adhere to the rules of common law : then if a question not of common law jurisdiction arises in a court of common law jurisdiction, *pari ratione*, that court is bound to adhere to the rules which would bind the court of peculiar jurisdiction.

Barnes's case is another to the same effect. I have translated and abridged it from the Norman French. It was a *Habeas Corpus*, directed to the Warden of the Cinque Ports, to bring up the body of Barnes. The return was, " That the Warden is admiral, and has a Court of Admiralty for sea causes which happen between high and low-water mark within the jurisdiction of the Cinque Ports, and has an officer to seize goods thrown by the sea on the shore, and that Barnes had carried away an anchor thrown upon the sand below high-water mark ; that he was summoned to the court, and ordered to restore the anchor, and that he refused. Therefore by the consideration of the said court he was imprisoned till he should restore the anchor to the Lord Warden or pay 40%. to the Lord Warden." Of course no court of common law could have pronounced such a judgment, and if it had done so, it would have been void and null. Various exceptions were taken to the return by Sir George Croke, counsel for the defendant, pointing out that the judgment was bad according to the rules of common law. Montague, Chief Justice, said, " It appears by the words *consideratum est*, that it was a judgment against him ; and although the manner of their proceed-

Barnes's case, 2  
Roll. Rep. 157,  
17 Jac. 1 A.D.  
1619.

Decision of Admi-  
ralty Court on  
maritime ques-  
tion conclusive.

ing is not according to our law, still we cannot redress this by the course taken of a *Habeas Corpus*; and it is alleged, that a Court of Admiralty and their proceeding was *juxta leges maritimas*, &c. and so he was remanded."—this being a commitment by the Admiralty Court *juxta leges maritimas*.

The same rule was acted upon in this Court in *Gould v. Gapper*, wherein Lord Ellenborough's judgment is important, as showing why the court of inferior jurisdiction is bound by the decision of the superior court. His Lordship there quoted the doctrine from Blackstone's Commentaries, (B. 3, c. 7,) that "where the question is not properly a spiritual question, but only

*Gould v. Gapper*,  
3 East, 472; 5  
East, 345; A.D.  
1803, 1804. Lord  
Ellenborough's  
judgment. 5 East,  
365.

allowed to be decided in those courts because incidental or accessory to some original question clearly within their jurisdiction, it ought, therefore, when the two laws differ, to be decided, not according to the spiritual but the temporal law, else the same question might be deter-

Judgment of  
court of original  
jurisdiction con-  
clusive.

mined different ways, according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a ground for prohibition."

And Lord Ellenborough expresses unqualified assent to the doctrine, that the Court is necessarily bound by the law of the

*Carter v. Crawley*, T. Raym.  
496, 34 & 35 Car.  
2, A.D. 1682.

court of original jurisdiction. There is another case of *Carter v. Crawley*, where there is a learned judgment by Lord North to the same effect, that the construction of Acts of Parliament by the common law binds the inferior court having jurisdiction incidentally.

My Lords, upon these authorities I humbly submit to your Lordships, that you are bound by the law of Parliament, as we set it out upon the record, there being no contradiction of it as alleged.

My Lords, I would now refer to Wilkes's case, as to the Privilege of Parliament in cases of libel. On the 30th April 1763, Wilkes was arrested on a warrant from the Secretary of State against the authors, printers,

*Wilkes's case*,  
19 How. St.  
981  
2 Wils. 151

Geo. 3, A. D.  
1763

and publishers of a treasonable paper, entitled “The North Briton, No. 45;”—he brought a *habeus corpus* in the Common Pleas, and objections were taken against the warrant of commitment;—among others that he was entitled to the Privilege of Parliament; but all these objections were overruled, except his claim of Privilege; upon that objection he was ordered to be discharged, and he was discharged accordingly.

But your Lordships are aware that afterwards both Houses of Parliament decided that Privilege of Parliament does not extend to

Resolution of H.  
C.

Nov. 24, 1763,  
14 Parl. Hist.  
1362.

Resolution of  
both Houses de-  
nying existence of  
Privilege.

cases of libel. There was a resolution to this effect

by the House of Commons, which was laid before

the House of Lords, and agreed to by them; in

that resolution, therefore, there was a declaration of

the law by both Houses of Parliament, which is still

in force; and I humbly apprehend, that if that de-

claration were brought judicially before the Court in

any case where that question incidentally arose, by that resolution of the two Houses of Parliament the Court would necessarily be bound.

I would again refer to what took place upon Wilkes’s expulsion from the House of Commons. The occurrence arose

16 Parl. His. 575.  
A. D. 1769.

in the year 1769. Wilkes was expelled as having

been convicted of a blasphemous and indecent libel,

and a new writ was issued, when he was re-elected without oppo-

sition. There was a resolution moved and carried, “That John

Wilkes, Esq., having been in this Session of Parliament expelled

from this House, was and is incapable of being elected a Member

to serve in this present Parliament.” The election being thus de-

clared void, and a new writ having been issued, Colonel Luttrell

appeared as a candidate. Wilkes had again a large majority, and

was returned by the sheriff. After this an Order was made by

the House, that Wilkes being disqualified, the return should be

amended by substituting the name of Colonel Luttrell, which was

done, and Colonel Luttrell sat during that Parliament as knight of

the shire. There were many motions made to rescind that resolution,

and at last it was rescinded, and declared by the Commons not to be the law of Parliament. If the question had incidentally arisen in this Court in an action for a false return, or a double return upon the statute, still this Court would be bound by the resolution declaring that a person expelled is disqualified; but that resolution having been rescinded, and there having been a declaration that the disqualification does not extend beyond the expulsion,—that the party expelled may be re-elected after his expulsion, that he is only to be sent back to his constituents, and they are to judge whether he is a fit person to represent them,—if this last resolution were brought judicially before your Lordships, by being pleaded upon the record, by this I say the Court would be bound.

I come now to mention cases which appear to me very important, showing that where courts of exclusive jurisdiction exist, they have been in the habit of preventing other courts interfering with their jurisdiction. These authorities would have justified the House of Commons in taking a summary course, and doing what I deprecated, having still confidence in Common Law Judges that they will not exceed their jurisdiction.

Courts of exclusive jurisdiction prevent other courts from interfering.

In the seventh year of James the First:—"Process issued out of the Exchequer, to levy an amercement of 10*l.*; the bailiff levied the amercement; *J. S.*, the person upon whom it was levied, brought trespass, and it was said by the Barons, and ordered, that if *J. S.* will bring an action for the distraining of this amercement, be it lawfully imposed or not, yet *J. S.* shall be restrained to sue in any other court but in this, and here he shall sue in the Office of Pleas, for the bailiff levied it as an officer of this Court." If *J. S.* after that, had brought an action in any other court, he would have been proceeded against by the Court of Exchequer, as being guilty of a contempt of the jurisdiction of that Court.

Anonymous,  
Lane's Exch. Rep.  
55, 7 Jac. 1,  
A.D. 1609.

My Lords, the same doctrine was also laid down very elaborately in the case of *Cawthorne v. Campbell*, a case not generally known in Westminster Hall, but of very

*Cawthorne v.*  
*Campbell,*

1 Anst. 205, n.  
31 Geo. 3,  
A. E. 1790.

An action brought  
in any other  
Court on a ques-  
tion within the  
jurisdiction of the  
Exchequer, may  
be removed into  
that Court, and it  
is a contempt to  
bring it elsewhere.

great weight. It was there held that, "If an action is brought in another Court to draw into question a matter within the peculiar jurisdiction of the Court of Exchequer, the action may be removed into the Court of Exchequer, and it is a contempt of that Court to prosecute it in any other Court." Cawthorne had been convicted before the Commissioners of Excise for penalties for a breach of the Excise

laws. There was a warrant of distress, and an action of trespass was brought in the Court of Common Pleas against the commissioners and officers who levied under the warrant. There was an application to the Court of Exchequer to remove the cause into that Court. Lord Chief Baron Eyre enters most elaborately into the subject, quotes a great many ancient authorities, and shows that it had been invariably the custom of the Court of Exchequer, when an action is brought in another Court, to try any question that is properly cognizable in the Court of Exchequer as belonging to the King's revenue, or what was done by the authority of the Barons for administering the King's revenue, not to allow the cause to proceed, and to remove it immediately from any other court into the Court of Exchequer. A great many precedents are quoted, in which that was the constant course pursued in ancient and modern times.

Anon.

1 Anstr, 205,  
33 Geo. 3,  
A. D. 1792.  
Same point.

Lord Chief Baron Macdonald followed that precedent in an anonymous case, reported in Anstruther, to which this case of *Cawthorne v. Campbell*

is subjoined as a note, and gave a similar judgment.

Now, my Lords, just see what is established by these cases in the Exchequer,—that no suit is allowed in another court, even where a question which it ought to decide arises incidentally,—that the parties are liable to be attached for proceeding in another court,—and that the other court may be commanded to surcease the suit.

The Court of Chancery proceeds on the same principle. An action against a receiver is treated as a contempt of the court by whom he was appointed, and to whom he is amenable.\* To this Court be-

(a) *Angel v. Smith*, 9 Ves. 335, A. D. 1804.

longs the administration of equity, and a Court of Common Law can not judge whether it was a right step to appoint a receiver, or whether he has duly conducted himself in his office. So the Court of Chancery will not allow the regularity of its process to be decided upon by any other tribunal, and exercises an exclusive jurisdiction over its own officers, even where there is a complaint that they have exceeded their au-

(b) *Baily v. Devereux*, 1 Vern, 269. *May v. Hook*, 1 Dick, 619,

thority, and there is a party aggrieved entitled to a recompence.<sup>b</sup> In *Frawd v. Lawrence*, a person arrested on an attachment irregularly issued, having obtained an order to discharge the attachment with costs, commenced an action against the party who had sued it out and the sheriff for false imprisonment and another action for maliciously suing out the attachment; but Lord Eldon granted an injunction against proceeding in these actions without prejudice to an application for compensation to the court from which the attach-

(c), *M. & K.* 563  
(d) 2 P. W. 657.

ment issued. In *Exparte Clarke*<sup>c</sup> the same principle was acted upon by Lord Lyndhurst. In *Holt v. Holt*<sup>d</sup>, where the Court of Chancery refused to allow such a matter to be examined by any other Court, compensation was actually awarded to be paid by the officer of the Court through whose default the wrong had been done.

The Court of Common Pleas has asserted a similar power, and threatened to commit any one who should bring an action to call in question its privileges. Mr. Serjeant Scroggs, prac-

Sergeant  
Scroggs's case,  
Bac. Abr. tit. Pri-  
vilege (B. 2),  
26 Car. 2, A. D.  
1676.

tising in that Court, when entering his coach at the door of Westminster Hall, was arrested upon a *latitat* out of the King's Bench, and complaint was made to the Court of Common Pleas that an officer of that Court, a serjeant, had been so arrested. The serjeant was discharged from the arrest by a rule of the Court; and the judges said that if the plaintiff should bring an action against the sheriff for an escape they would commit him. The bailiffs who made the arrest were committed to the Fleet; but the next day, upon their submission, they were discharged upon paying fees.



The same course has been pursued down to the present times by the highest court of judicature in the kingdom.

In the year 1768, the House of Lords being informed that an action had been brought and prosecuted in the Common Pleas by one John Biggs, and one Aylett, his attorney, against Mr. Hesse, one of his Majesty's Justices of the Peace, who had acted under the order and command of their Lordships' House, and who had apprehended a man, and without any further order of the House had committed him and kept him in Bridewell four or five days, for being concerned in a riot at the door of the House of Lords, the Lords first passed a resolution, declaring, "That, according to the laws and usages of Parliament, it is the undoubted right and duty of the Peers of Great Britain, in Parliament assembled, to give such orders as may be from time to time found necessary to disperse and suppress any force which shall obstruct their coming to, remaining in, or returning peaceably from, the House, or that may tend to interrupt the Parliamentary debates." They then ordered the plaintiff into the custody of the Serjeant-at-Arms, and they committed the attorney to Newgate. They afterwards called in the plaintiff, who was directed to stop all further proceedings; and upon his signing a release, and not till he had done so, was he ordered to be discharged out of custody. The attorney, who, having been the adviser of the plaintiff, was considered the greater offender, was kept in Newgate for ten days, and then discharged upon his humble petition.

In 1788, Mr. Hyde, a Justice of the Peace, having attempted to get into Westminster Hall, on the occasion of the trial of Warren Hastings, was refused admission by a constable, in pursuance of a general order of the House of Lords. Mr. Hyde indicted the officer for an assault; the officer pleaded to the indictment, was tried at Hicks's-hall, and acquitted. At the distance of some months the case was brought before the House of Lords; they committed Mr. Hyde, the justice, for his offence, to the custody of the Serjeant-at-Arms; that offence

Biggs's case, 22  
Lords' Journ. p.  
185. Nov. 1768.

Hyde's Case, 38,  
Lords' Journ. p.  
240b, June 1788.

having been the prosecuting of a person at Hicks's-hall for an act which he performed in obedience to the order of the House of Lords.

The case I am now going to mention occurred so recently as the year 1827. It was likewise a proceeding, not of the House of Commons, but of the House of Lords. Lord Eldon, that profound lawyer, presiding in the House of Lords, advised the proceeding. There was a stranger coming to the House of Lords, whose umbrella was taken from him by a messenger at the door of the House, and not returned to him when he retired. The owner of the umbrella did not bring an action in the Court of King's Bench ; but had he done so, the law would have been the same ; he brought an action before another court, the Court of Conscience ; there he sued for the value of his umbrella, and he obtained judgment. But, my Lords, he was not permitted to have the fruits of the judgment, because the bringing the action was considered by the House of Lords to be a violation of their privileges ; that whether the messenger had a right to take the umbrella or not was a question for them to decide, and not the Court of Conscience, and they summoned him to the bar, aye, and the officers of the Court of Conscience. They compelled the plaintiff to renounce all benefit of the judgment ; and it was only upon the officers of the Court showing that they were not aware how the cause of action originated that they escaped with impunity. My Lords, I will read from the Journals of the House of Lords the entries respecting the Umbrella case, that it may be seen they are fully and fairly brought before your Lordships' notice :

Umbrella case,  
Lords' Journ.  
26 March, 1827.

Action in the  
Court of Con-  
science by the  
owner of an  
Umbrella against  
the Messenger of  
the House of  
Lords, when he  
obtained judg-  
ment, treated as a  
contempt.

“ Complaint against John Bell.

“ *Die Lunæ, 26<sup>o</sup> Martii, 1827.*

“ Complaint was made to the House, ‘ That John Bell had served Frederick Plass, one of the doorkeepers of this House, when attending to his duty in this House, with process from the Westminster

Court of Requests, first to appear, and afterwards to pay a debt and costs awarded against him by that court.' And the said Frederick Plass having been called in, and sworn at the bar, delivered in the said two processes, and being examined, stated, 'that John Bell served him, the said Frederick Plass, when on duty in this House, with process to appear on Monday the 19th instant, to attend the Westminster Court of Requests on the Thursday following; and the said John Bell informed the said Frederick Plass that the process was issued to recover the value of an umbrella left by the said John Bell with the said Frederick Plass, on the night of the Friday preceding; that the said John Bell gave him the umbrella, and he put it away in the usual place; that on Friday last, the 23d instant, the said John Bell served the said Frederick Plass, when on duty in this House, with an order from the said court to pay into the said court 17s. 6d. debt, and 2s. 10d. costs, for the use of the said John Bell.'

Next there is set out the order requiring Plass to appear; and then there is the process ordering Plass to pay 17s. 6d. debt and 2s. 10d. by way of costs. I need not read these at length. Then it is ordered by the Lords Spiritual and Temporal, "that the said John Bell, and ——— Grogan, and ——— Hodgson, the clerks of the said court, do attend this House to-morrow, to answer the said complaint, and that the Lords be summoned."

The next entry on the subject is,

*"Die Martis, 27<sup>o</sup> Martii, 1827.*

"The Lords being summoned; the Order of the Day being read for John Bell, ——— Grogan, and ——— Hodgson to attend this House to answer the complaint of Frederick Plass, one of the door-keepers, against the said John Bell, for having served him with process from the Westminster Court of Requests, first to appear, and afterwards to pay a debt and costs awarded against him by that court, and for the Lords to be summoned. John Bell was called in, and informed by the Lord Chancellor of the said complaint, and asked what he had to say in answer thereto, and stated, 'That he was not aware he was offending against the Privileges of this House,

or he would not have done what he did,' for which he expressed his sorrow, and asked pardon ; and being admonished, was ordered to withdraw." So much for Bell.

"Then Edward Carey Grogan and John Hodgson were called in, and informed of the said complaint, and severally stating that they were not aware of the nature of the complaint, upon the summons being granted, or that the subject-matter related to anything in this House, they were directed to withdraw." That being a clear intimation that if they had taken cognizance of the suit, knowing it originated in this dispute in the House of Lords, it would have been considered a breach of Privilege. The plaintiff expresses his contrition, and it is upon the clear understanding he is not to call upon the doorkeeper to pay what the Court of Requests awarded to him that he escapes imprisonment. If the action had been brought in the King's Bench, an action of trover for the umbrella, with a judgment of 40s., or whatever the value was, I conceive that the proceeding would have been considered in the same light ; it would have been considered a breach of the Privileges of the Houses of Parliament. Here is a court of common law taking cognizance of Privilege, which was *alieni fori*. The ground of the proceeding of the House of Lords was, not that they had gone before the Court of Requests, but that they had gone before another court,—that the complaint ought to have been in the House of Lords ; that the doorkeeper, perhaps, had acted improperly, but it was a contempt of the House of Lords for that complaint to be brought before any other court whatsoever.

Lord C. J. *Denman*.—Mr. Attorney, did it appear there was anything else done by the officer of the House, except taking the umbrella from him while in the House ?

Mr. *Attorney-General*.—I have read the whole entry from the journals. It could hardly be considered, that the case was within the Bill of Rights, because the seizure was in the House, and the action was for a thing done in Parliament ; whereas, the Lords would not have interfered if the seizure had been in the Lobby. They did not proceed upon the merits. Their displeasure was

incurred by the suit being brought in an inferior court, instead of the complaint being made to the House. You see the contempt was considered to be the seeking of redress elsewhere. What was

The course would have been the same had the action been brought in Westminster Hall.

treated by the House of Lords as a contempt against the Privilege of the House, was bringing the action,—serving on their officer the process of the Court of Requests, and an order for the payment of the money. I apprehend, that the course of the Lords would have been precisely the same if the action had been brought in any of the superior Courts in Westminster Hall. They would have committed the plaintiff unless he had agreed to renounce the judgment he had obtained against the officers of the House; and they would have strictly inquired into the conduct of all practitioners of the law, and officers of the Court, who had been instrumental in obtaining the judgment.

According to these authorities the House of Commons would have been justified in committing Mr. Stockdale for bringing this action, and would be justified, if there were a judgment in his favour, in preventing him from reaping the fruits of it, and in proceeding against all who assist him in violating their Privileges.

I will now, my Lords, shortly draw your attention to another class of cases, in which, although it did not appear that either House had interposed, or that any act of either House was drawn in question, it was held, that an action could not be maintained;—the Judges avoiding, instead of courting the discussion of questions of Privilege, and being anxious to prevent, instead of forcing on a collision with the House of Commons. I refer to cases where the action was for a

Actions for false or double returns.

false return or double return of Members to serve in the House of Commons. Your Lordships are aware that an Act of Parliament passed in the reign of King William III., by which such an action might be brought; but it was most undoubtedly held that at common law such an action was not maintainable, for the reason I have mentioned.

Before stat. 7 & 8 W. 3, ch. 7, A.D. 1695.

The first case in which the question arose was *Nevill v. Stroud* ; but it was there left undecided.

*Nevill v. Stroud*,  
2 Sid. 168. 2 Lev.  
115. 3 Lev. 30. 1  
Lutw. 89, 1659.  
*Bernardiston v.*  
*Soame*, 2 Lev.  
114. Freem. 390,  
430. 6 How. Sta.  
Tri. 1063. 26 Car.  
2, A.D. 1673.

The next case was one upon which my Learned Friend, Mr. Curwood, relied, *Bernardiston v. Soame* ; and I am rather surprised, that he did, because the decision in that case was reversed upon writ of error. Although it had been held, and rightly held, that such an action could be maintained at common law, that would not remove me from any of the positions I have laid down, because bringing this action for a false or double return does not necessarily show that anything done in Parliament is to be called in question ; it does not necessarily produce any collision ; and in *Ashby v. White*, the ground upon which Lord Holt proceeded was, that the elective franchise was not a matter of Parliamentary Privilege, but dependant upon the statute and common law of the realm.

*Bernardiston v. Soame* was an action on the case against the sheriff of Suffolk, alleging that the plaintiff had been elected knight of the shire by a majority of freeholders, and that defendant falsely and deceitfully made a double return of Lionel Tolmache along with the plaintiff.

Not guilty being pleaded, there was a trial at bar, and a verdict for the plaintiff with 800*l.* damages ; but a writ of Error was brought in the Exchequer Chamber upon an objection that the whole subject matter of it related to and concerned the Parliament. There were six Judges for reversing and two for affirming, and the judgment accordingly was reversed.

Action against  
sheriff for a false  
return, held  
maintainable in  
K. B.

Reversed on writ  
of Error in the  
Exch. Cham.

My Lords, the judgment of North, Chief Justice, upon that occasion is of extreme importance. I should be glad to read the whole, but I will confine myself to two or three of the most material parts of it. He says, “ It is admitted that the Parliament is the only proper judicature to determine the right of election, and to censure the behaviour of the sheriff. How then can the

Judgment of Lord  
North ;  
6 How. Sta. Tri.  
1092, 1098,  
26 Car. 2, A. D.  
1674.

Common Law try a cause that cannot determine of those things without which the cause cannot be tried? No action upon the case will lie for breach of a trust, because the determination of the principal thing, the trust, does not belong to the Common Law, but to the Court of Chancery; certainly, the reason of the case at bar is stronger, as the Parliament ought to have more reverence than

p. 1099. the Court of Chancery.”—“I do not by these re-

flections tax the law of injustice, or the course of Parliament of inconvenience; I am an admirer of the methods of both; it is from the excellency of them I conclude this proceeding in this new-fangled action, being absurd, unjust, and unreasonable,

p. 1101. cannot be legal.”—“And here I must needs reflect

upon the second reason I gave against the action, that the matter of it is *alieni fori*. I find myself and my brothers that argued for the action engaged in a discourse of the nature of a double return, and the course of Parliament upon it, which, as a Judge, I cannot so well speak to. I had the honour to be of the House of Commons, and whilst I was there, I considered as well as I could the course of the proceedings of the House, and am therefore able to speak something of them, and I am brought into this discourse necessarily by this action; but I must needs say, it is an improper discourse for Judges, for they know not what is the course of Parliament, nor the Privilege of Parliament. When the Lords in Parliament, whom they are bound to assist with their advice, ask the Judges anything concerning the course of Privilege of Parliament, they have answered that they know them not, nor can advise concerning them. If in Parliament we do not know nor can advise concerning these things, how can we judge upon them out of Parliament? We ought to know before we judge, and therefore we cannot judge of things we cannot know. Our being engaged in a course improper for Judges, shows the action to be improper as much as any other argument that can be made; and this argument arises from my brothers that argued for the action. It is my

p. 1109. opinion that no new device ever was or can be introduced into the law but absurdities and difficulties

arise upon it which were not foreseen, which makes me very jealous of admitting novelties.”—(That was an action of the first impression, and so is this.)—“But in matter relating to the Parliament, which is my second ground, there is no need of introducing novelties, for the Parliament can provide new laws to answer any mischiefs that arise, and it ought to be left to them to do it.” And accordingly, my Lords, the Parliament did introduce a remedy for that mischief, in the reign of William the Third.

His Lordship proceeds : “The Judges in all times have been very tender in meddling with matters relating to Parliament. I do not find that ever they tried elections, but where statutes gave them express power, or that they examined the behaviour of the sheriff or any officer of the Parliament, in relation to any service performed to the Parliament, but upon those statutes ; and in Brounker’s case (Dyer 168), the statute was there ruled in the Star Chamber, and they inflicted the same punishment that is appointed by that statute. If we shall allow general remedies, as an action upon the case is to be applied to cases relating to the Parliament, we shall at last invade Privilege of Parliament, and that great privilege of judging of their own Privileges.”

My Lords, we have from the most eminent Judges in all periods of the judicial history of the country the same language, that by meddling with the law of Parliament they would be invading the Privileges of Parliament, and that greatest Privilege, the privilege of judging of their own Privileges.

Lord C. J. North proceeds : “Suppose an action should be brought in time of prorogation against a Member of Parliament, for that he falsely and maliciously did exhibit a complaint of breach of Privilege to the Parliament, whereby the party was sent for in custody, and lost his liberty, and was put to great charges to acquit himself, and was acquitted by the Parliament. If upon such a case the jury should find the defendant guilty, why should not that action be maintained as well as this at bar ? It may be said for that action, that the judgment of the Parliament is followed, and the Privilege is not tried at law, but determined first in the House : and secondly,



it may be said the party has no other way to recover his charges. It would be dangerous to admit such an action, for then there would be peril in claiming Privilege, for if the party complained of had the fortune to be acquitted by the House, the Member that made the complaint would be at the mercy of the jury as to the point of malice and quantity of damages. Such a precedent, I suppose, would not please the Parliament, and yet it may with more justice be the second case than this at the bar the first. Actions may be brought for giving Parliament-protections wrongfully. Actions may be brought against the Clerk of the Parliament, Serjeant-at-arms, and Speaker, for aught I know, for executing their offices amiss, with averments of malice and damages, and then must Judges and juries determine what they ought to do by their officers? This is in effect prescribing rules to the Parliament for them to act by. It cannot be seen whither we shall be drawn if we meddle with matters of Parliament in actions at law."

Judgment of Ex-  
chequer Chamber  
affirmed in House  
of Lords.  
6 How. Sta. Tri.  
1119, A.D. 1689.

My Lords, that case was brought by writ of error to the House of Lords after the Revolution in 1689, The Judges were consulted, and the judgment was affirmed on the ground that no action could be maintained for such a cause without the aid of the statute.

Onslow's case,  
2 Vent. 37;  
3 Lev. 39,  
33 Car. 2, A.D.  
1680.

The same opinion was given in Onslow's case, which was an action for a false return. A motion was made in arrest of judgment, and the judgment was arrested, the Court saying, "They had no jurisdiction in this matter; this principal part thereof being a return in Parliament."

Prideaux v. Mor-  
ris, 2 Salk. 502;  
1 Lutw. 82;  
7 Mod. 13;  
Holt, 523.  
2 Anne, A.D.  
1702.

Prideaux v. Morris was an action for a false return, in which it was held that "no such action lies at Common Law against an officer for a false return of Members to Parliament, unless where the right is determined, or cannot be determined, in Parliament;" and in that judgment even Lord Chief Justice Holt concurred.

In Wynn v. Middleton, which was an action on the statute of

Wynn v. Middleton,  
1 Wils. 125;

Willes, 597;

19 Geo. 2, A.D.  
1745.

Will. III., it was held not to be necessary that it should appear there was any resolution of the House of Commons respecting the right of election. There, indeed, Willes, Justice, declared his opinion, that an action for a false return did lie at the Common Law, but that was contrary to the repeated decisions of Courts of Law, and the decision of the House of Lords, after the Judges had been consulted. What would the Judges who decided these cases have said of an action to overrule a decision of a House of Parliament respecting its Privileges?

I pass on, my Lords, to another class of cases, in which prosecutions or actions have been brought for what passed in Parliament, or for acts done by the authority of Parliament. In all these cases it was either held originally that the prosecution or action could not be maintained, or any judgment in favour of such prosecution or action has been reversed.

Prosecutions or actions, for acts done in or by the authority of Parliament.

Bishop of Winchester's case, 13 How. Sta. Tri. 1435, 4 Inst. p. 17, 3 Edw. 3, A.D. 1328.

Proceeding in K. B. against the Bishop for departing from Parliament.

The earliest case upon this subject is the Bishop of Winchester's, which was a "proceeding in the Court of King's Bench against the Bishop for departing from Parliament while Parliament was sitting, without the King's licence, in contempt of the King, and against his inhibition." The plea was, that "if any summoned to Parliament hath been guilty of any default towards the Lord our King in Parliament, he ought to be corrected and amended in Parliament, and not elsewhere in an inferior Court. Therefore he does not intend that he is to answer here for such a trespass and contempt done in Parliament." That plea to the jurisdiction prevailed. Lord Coke, in his 4th Institute, sets out the record, and then he says, "whereby it appeareth that the plea of the Bishop to the jurisdiction of this Court, after divers days given, did stand, and was never overruled, agreeably to the said resolutions in former times, that Judges were not to determine matters concerning the Parliament, as is aforesaid." Therefore it was determined, that a Court of Common Law had no

jurisdiction to inquire whether the Bishop was answerable for having absented himself from Parliament.

Plowden's case was one of the same nature. There was an information, by the Attorney-general, in the Court of King's Bench, against forty Members of the House of Commons, for departing without licence, contrary to the inhibition of the Queen. Most of the defendants had seceded from the House of Commons during the session, finding the majority against them irresistible. Six submitted, and were fined, while others, among whom was the famous lawyer Plowden, the author of the Commentaries, came in and defended. He did not plead to the jurisdiction, but pleaded in bar that he did attend in Parliament to the end of the session; and the prosecution dropped by the death of Queen Mary.—It must not be supposed that this great lawyer allowed that the Court had any jurisdiction upon the subject. His traversing merely amounted to this, that *de facto* he had not pursued the line of conduct imputed to him, and nothing occurred after his plea—by which he averred he had attended during the session, according to the Queen's command. The Queen died, and we know not what would have been the result of the suit.

Plowden's case,  
1 Parl. Hist. 625;  
4 Inst. p. 17.  
1 & 2 Ph. & Ma.  
A. D. 1555. In-  
formation by At-  
torney-general for  
departing from  
Parliament.

Perhaps the most celebrated case respecting prosecution for an act done in Parliament, was Strode's, which arose in the time of Henry the Eighth. Strode being a Member, proposed a Bill in Parliament for the regulation of the tanners in Cornwall: he was prosecuted in the Stannary Court, and fined for this offence,—the Warden, no doubt, being extolled as a great and enlightened Judge, who, disregarding the power of the House of Commons, stood up for the liberties of Cornwall. For nonpayment of his fine Strode was imprisoned in Lidford Castle till he was delivered by a Writ of Privilege, on giving security to save harmless the warden's deputy, in whose custody he was. Upon that occasion an Act of Parliament was passed, in which it was declared that this proceeding against Strode for what he had done in Par-

Strode's case,  
1 Hats. 86:  
4 Parl. Hist. 85;  
4 Hen. 8.  
A. D. 1512.  
Prosecuted for  
proposing a Bill  
in Parliament.

Stat. 4 Hen. 8,  
ch. 8, declares  
such prosecution  
to be contrary to  
law.

liament was contrary to law, and by which it was considered and enacted that no such proceeding should take place in future in any court against any Member of Parliament. The Act provided, "That all *suits*, condemnations, *executions*, fines, amerciaments, punishments, corrections, grants, charges, and impositions put or had, or hereafter to be put or had, upon the said Richard, and to every other of the person or persons afore specified, that now be of this present Parliament, or that of any Parliament thereafter, shall be for any Bill, speaking, *reasoning*, or *declaring of any matter or matters concerning the Parliament* to be communed and treated of, be utterly void and of none effect."

Resolutions of  
both Houses, that  
this Act was a ge-  
neral law, Com.  
Journ. 12th Nov.  
1667; Lords'  
Journ. 11 Dec.  
1667.

It was afterwards resolved by both Houses of Parliament that this Act of Parliament "extends to indemnify all and every the Members of both Houses of Parliament in all Parliaments for and touching all Bills, speaking, *reasoning*, or *declaring of any matter or matters in and concerning the Parliament* to be communed and treated of, and is only a declaratory law of the ancient and necessary Rights and Privileges of Parliament."

My Lords; is not the present action by Mr. Stockdale against the printers of the House of Commons for obeying the orders of the House, a suit which originates from declaring a matter in and concerning Parliament. It should therefore be pronounced utterly void and of none effect. Instead of giving such a judgment, it is proposed that your Lordships in imitation of the Stannaries Court, should cause English subjects to be fined and imprisoned for doing their duty.

The next case is Sir John Eliot's, in which likewise the prosecution in the first instance succeeded. There was an information by the Attorney-general, Sir Robert Heath, against Sir John Eliot, for having said, "That the Council and Judges had all conspired to trample under foot the liberties of the subject," and against others who concurred with him, for having opposed the adjournment of the House of Commons contrary to the direction

Sir John Eliot's  
case, 3 How. St.  
Tr. 295; 5 Car. 1,  
A.D. 1629. Infor-  
mation for acts  
done in Parlia-  
ment.

of the King. The Speaker wished to leave the chair, and Hollis and others would not consent, and insisted upon his putting the question. Now the information of Sir Robert Heath disclosed, that what had been done had been done in the House of Commons. There was a plea to the Jurisdiction. For the purposes of this prosecution, Crewe, who had been Chief Justice, was removed, and Hyde was put in his stead. The new Chief Justice said to the

3 How. Sta. Tri.  
pages 294-5.

counsel of the defendants, "So far light we will give you : this is no new question, but all the Judges in England, and Barons of the Exchequer before now have oft been assembled on this occasion, and have with great patience heard the arguments on both sides, and it was resolved by them, all with one voice, that an offence committed in Parliament criminally and contemptuously, the Parliament being ended, rests punishable in another court." (The opinions of the Common Law Judges on this question of Privilege had been taken before the prosecution was commenced).

Mr. Justice Jones says, "It is true that we have all resolved, that an offence committed in Parliament against the Crown is punishable after the Parliament in another court, and what court shall that be but the Court of King's Bench, in which the King by intendment sitteth?"

Mr. Justice Whitlocke, "The question is now reduced to a narrow room, for all the Judges are agreed, that an offence committed in Parliament against the King or his Government may be punished out of Parliament, so that the sole doubt which now remains is, whether this court can punish it."

"Croke agreed that so it had been resolved by all the Judges, because otherwise there would be a failure of justice, and by him ; if such an offence be punishable in another court, what court shall punish it but this court, which is the highest court in the realm for criminal offences ; and perhaps not only criminal actions committed in Parliament are punishable here, but words also."—That is, that words spoken by a Member in his place in the House of Commons are punishable in the Court of Queen's Bench.

Mr. Justice *Patteson*.—Where is that to be found?

Mr. *Attorney General*.—In the third volume of the State Trials, p. 295. That was at the breaking of the case. By-and-by your Lordships will find, that they solemnly decided that those five gentlemen were liable to be prosecuted by the Attorney-general for the words they had spoken in the House of Commons, for “otherwise there would be a failure of justice, and wrongs would be unpunished.”

Mr. Justice Jones, in giving judgment, says, “I question not these matters, but I hold that an offence committed criminally in Parliament may be questioned elsewhere, as in this court, and that for these reasons :

“First. *Quia interest reipublicæ ut maleficia non maneat impunita*, and there ought to be a fresh punishment of them. Parliaments are called at the King’s pleasure, and the King is not compellable to call his Parliament, and if before the next Parliament the party offending, or the witnesses die, then there will be a failure of justice.

“Secondly. The Parliament is no constant court. Every Parliament mostly consists of several men, and by consequence they cannot take notice of matters done in the foregoing Parliament.”

So he goes on to reason that, after the dissolution of Parliament, this Court had clearly jurisdiction over everything done in it.—Then Lord Chief Justice Hyde speaks to the same effect:—“As to what

was said, that an inferior court cannot meddle with matters done in a superior; true it is that an inferior court cannot meddle with judgments of a superior court; but if particular members of a superior court offend, they are oftentimes punishable in an inferior court, as if a judge shall commit a capital offence in this court, he may be arraigned thereof at Newgate.”

There is a great deal of reasoning by the Judges to the same effect; and Mr. Justice Whitlocke says, that “the question now is, not between us that are Judges of this Court, and the Parliament, or between the King and the Parlia-

ment, but between some private Members of the House of Commons, and the King himself."

It is remarkable, that in all those judgments, however outrageous, all the Judges acknowledge that they would have no jurisdiction over the act of the whole House; they only arrogate to themselves jurisdiction over the acts of the Members of the House. Those five Patriots who were to be punished were a small section in the House. The distinction is attempted between the acts of the House and the acts of the Members of the House; and even Lord Chief Justice Hyde, and Mr. Justice Jones, and Mr. Justice Whitlocke, admit that over acts of the House the Court would have no jurisdiction. It has been reserved for the present age to see propounded the contrary doctrine on which this action rests.

The five Members were accordingly found guilty, and sentenced.

The Judgment of the Court is thus stated: "Sir  
p. 310.

John Eliot, inasmuch as we think him the greatest offender, and the ringleader, shall pay to the King a fine of 2,000*l.*; Mr. Hollis, a fine of 1,000 marks; and Mr. Valentine, because he is of less ability than the rest, shall pay a fine of 500*l.* And to all this the other Justices with one voice accorded."

But at last Parliament met. This proceeding was reviewed, and considered a great grievance; and it is recited in the Petition of Right, "That the exhibiting of the information against Mr. Hollis, Sir John Eliot, and Mr. Valentine. in the King's Bench, being Members of Parliament, for matters done in Parliament, was a breach of the Privilege of Parliament.—That the overruling of the plea pleaded by Mr. Hollis, Sir John Eliot, and Mr. Valentine, upon the information to the jurisdiction of the Court, was against the law and Privilege of Parliament.—That the judgment given upon a *nihil dicit* against Mr. Hollis, Sir John Eliot, and Mr. Valentine, and fine thereupon imposed, and their several imprisonments thereupon, was against the law and Privilege of Parliament." Afterwards in the reign of Charles the Second, there were

Joint Resolutions  
of both Houses

joint resolutions of both Houses of Parliament against this proceeding—when it was resolved, both Houses

against this judgment, 3 How. St. Tr. 319.

Judgment reversed on writ of error, 3 How. St. Tr. 331, A.D. 1663.

concurring, that the Act of Parliament of the 4th Henry the 8th, called Strode's Act, was a general Act; and that the judgment of the Court against Sir John Eliot, and others, was an illegal judgment, and that it ought to be reversed. Finally, my Lords, a writ of error was brought upon the judgment and it was judicially reversed.

Here you have another instance of a proceeding against a Member of Parliament for what he had done in Parliament, which did succeed in the first instance, but where the judgment was afterwards reprobated and overturned as a warning to all succeeding Judges.

It is not perhaps strictly necessary, as my learned Friend Mr. Curwood has renounced the *King v. Williams*, to mention that case to your Lordships, for the purpose of getting rid of its authority; but it is very material that your Lordships should have fully brought before you the proceedings in that case which terminated in a strong legislative declaration in my favour. There it was held in the first instance, that the Speaker was liable for what he had done by the order and authority of the House of Commons. But, my Lords, that judgment was reversed by the Bill of Rights, by which it was expressly declared that in future no such proceeding should take place. The present action against an officer of the House of Commons for what had been done by the authority of the House of Commons, is a direct violation of the Bill of Rights.

The *King v. Williams* was an information by Sir Robert Sawyer, the Attorney-general, for causing to be printed and published "Dangerfield's Narrative," alleged to be a libel upon the Duke of York (afterwards James II.) There was a plea to the jurisdiction of the Court.

Plea to the jurisdiction.

"At such a day the defendant came, by his attorney, and having heard the information read, says that he does not intend that answer ought to be made to the said information in the Court of our Lord the King here,



because, he says, that the matter in the said information mentioned ought to be heard and determined in Parliament, and not in the Court of our Lord the King here ; and he further saith, that by the law and custom of Parliament, the Speaker of the House of Commons, according to the duty of his office as a servant of the House, ought and has always been accustomed to speak, sign, and publish such proceedings of the House of Commons, and in such manner and form, as he has been ordered to speak, sign, and publish by the Commons assembled, which speaking, signing, and publishing by the Speaker in manner aforesaid are the acts and doings of the Commons in Parliament assembled, and are the speaking, signing, and publishing of the Commons, and that for such signing and publishing the Speaker ought not to answer in any court except in Parliament ; that the defendant was a Member of the House of Commons, and was elected Speaker ; that in a Session held in the 32nd year of the late King, there was an inquiry made by the Lords and Commons into a certain conspiracy ” (alluding to the alleged Popish plot) ; “ and that Dangerfield exhibited and delivered at the bar of the House of Commons, upon his oath, an information respecting the conspiracy as appears of record among the records of Parliament ; ” (this narrative had been entered upon the journals of both Houses of Parliament :) “ and that the Commons ordered this, among other informations so given in at the bar respecting the said conspiracy, to be printed, being first perused and signed by the Speaker, and that the Speaker should assign persons to print the said information ; ” the plea then shows that the defendant acted in obedience to this order, and appointed Newcomb and Hills, then printers to the King, to print it, and negatives any other printing or publishing ; “ and this he is ready to verify. Wherefore, as the matter aforesaid was done by him as Speaker of the said Commons House in Parliament assembled, by order of the Commons assembled in their House, sitting in Parliament, and not in any other manner, or at any other time,” he concludes that the Court will not take cognizance of this prosecution. To this plea the Attorney-general demurred.

Your Lordships are aware of the elaborate argument for the defendant, prepared by Sir Robert Atkyns, afterwards Chief Baron; he had been a judge of the Common Bench, but was removed for his honesty in 1679; he wrote this argument while in retirement, but it was never delivered.

Argument prepared by Sir Rob. Atkyns.

In 2nd Shower's Reports, there is an account of all that took place, and, certainly, my Lords, that was rather a shorter argument in defence of Privilege, than this to which your Lordships are now condemned to listen. I will read the whole of the report.

2 Shower, 471.

"Information for publishing an infamous libel called 'Dangerfield's Narrative.'

Report of the proceedings in K. B.

"Defendant pleads, that by the law and customs of England, the Speakers of the House of Commons have signed and published the Acts of the House, &c.

"Mr. Attorney-general demurs.

"Mr. Jones was beginning to argue, and took some exceptions, as that he doth not aver the libel in the information, and that in the plea to be the same.

"Lord Chief Justice.—We will not, in such a case, debate the formality of such an idle insignificant plea. Let us hear what they have to say for it.

"Mr. Pollexfen began, the Court of Parliament, &c.

"Lord Chief Justice.—Court do you call it? Can the order of the House of Commons justify the scandalous, infamous, flagitious libel?

"Mr. Pollexfen then said, I have no more to say.

Judgment. "Lord Chief Justice.—Let judgment be entered for the King."

So much for Buckingham!

"And afterwards Mr. Williams was fined 10,000*l.*, and upon payment of 8,000*l.*, satisfaction was acknowledged upon record."

Defendant fined.

The whole proceeding, I suppose, was over in five minutes. The

That case cannot  
be distinguished  
from the present.

Counsel for the Crown, who had to begin in support of the demurrer is immediately stopped by the Court—with an intimation, that the plea is idle and insignificant; and the Counsel for the Defendant, before he had finished his first sentence, is put down with a jeer at the House of Commons presuming to be a Court.

If Mr. Pollexfen was not as has been suspected, in collusion with the prosecutor; he must at least be severely blamed for his dastardly submission, however slender his hope might be, of making any impression upon the Court by further argument.

I do not wonder that my Learned Friend, Mr. Curwood, should disclaim any reliance upon such an authority; but at the same time let me make this observation, that unless that case was rightly decided, the present action cannot be supported. If rightly decided, it would be a direct authority for my Learned Friend. It cannot be distinguished from the present; it is on all fours with it; he is bound to defend it; but he acknowledges that he must surrender it. Why? because it was a prosecution for what had been done under the authority of the House of Commons.

This is not a prosecution; this is not an information by the Attorney-general; but it is an action against the officer of the House, acting by the authority of the House; and there can be no doubt that if this action lies, an indictment or information might be preferred; action or prosecution for libel resting precisely upon the same foundation. This action cannot be maintained, unless the alleged libel be a malicious and unauthorised publication; and if it be so, then the parties would be subject to a criminal prosecution, and if Mr. Hansard would, so would the Right Honourable James Abercromby, who signed the order for printing it.

Such, my Lords, were the proceedings against Speaker Williams before the Revolution. But let us advert to what was afterwards done: at the meeting of the Convention Parliament, this case was made one of the chief grounds for dethroning James II., and

The proceedings  
in that case one of  
the grounds for  
dethroning Jas. 2.

offering the Crown to the Prince of Orange. The first part of the eighth head of means used by the King to subvert the laws and liberties of the country, states this very proceeding : “ by causing informations to be brought and prosecuted in the Court of King’s Bench, for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses.”

Com. Journ. 8  
Feb. 1688.

To this article the Lords at first disagree, and give for a reason, because they do not fully apprehend what is meant by it, nor what instances there have been of it, which, therefore, they desire may be explained, if the House shall think fit to insist further on it.

11 Feb. 1688.

Then “ The House disagree with the Lords in their amendment of leaving out the eighth article ; but in respect of the liberty given by the Lords, in explaining that matter,—

12 Feb. 1688.  
Resolutions of the  
two Houses.

“ Resolved, That the words do stand in this manner :

“ By prosecutions in the Court of King’s Bench for matters and things cognizable only in Parliament, and by divers other arbitrary and illegal courses.”

By which amendment (as a former Committee of the House of Commons observes), “ The House adapted the article more correctly to the case they had in view ; for the information was, in fact, filed in King Charles the Second’s time, but the prosecution was carried on, and judgment obtained in the second year of King James.” Therefore, it was not correct to say, that such prosecutions had been brought in the time of King James. In order that the matter might be more fully inquired into, and “ that the meaning of the House should be made more evident to the Lords, the House ordered that Sir William Williams be added to the managers of the Conference, and Sir William Williams the same day reports the conference with the Lords, and that their Lordships had adopted the article in the words as

Report of Select  
Com. on Obstruc-  
tions to Execution  
of Orders of the  
House, A. D. 1771,  
p. 25, reprinted in  
Report on Publi-  
cation of Printed  
Papers, 8 May  
1837, App. B. p.  
55.

Report of Com-  
mittee, A. D. 1771,  
p. 25.

amended by the Commons. And corresponding to this article of grievance is the assertion of the right of the subject in the ninth article of the declaratory part of the Bill of Rights; viz., "that the freedom of debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Then, "on the 11th of

*Ib.* p. 26.  
10 Com. Journ.  
p. 177.  
Record of proceedings brought before House of Commons. Resolution of House of Commons, that the judgment was illegal. Report, A. D. 1771, p. 26.  
10 Com. Journ. 215.

June, the House ordered that the records of the King's Bench relating to the proceedings against William Williams, Esq., now Sir William Williams, Knight and Baronet, late Speaker of this House, be brought into this House by the *custos brevium* of the said Court on Thursday morning next.

"On the 12th of July the record was read, and the House thereupon resolved that the judgment given in the Court of King's Bench in Easter Term. 2 J. 2, against William Williams, Esq., Speaker of the House of Commons, in the Parliament held at Westminster, 25th October, 32 Charles 2d, for matters done by order of the House of Commons, and as Speaker thereof, is an illegal judgment, and against the freedom of Parliament."

It may be said this is only a resolution of one branch of the legislature; but then, my Lords, on looking at the Bill of Rights passed by the Lords and Commons, and assented to by the Crown, you will find in that Bill one ground for the dethronement of King James, or what is called his abdication, was this very prosecution. My Lords, the Bill of Rights commences by reciting the declaration of rights presented to the King and Queen, when Prince and Princess of Orange, which ran thus: "Whereas, the late King James the Second, by the advice of divers evil counsellors, judges and ministers, employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom." It then mentions various things which the King had done in the prosecution of these endeavours, "by prosecutions

Bill of Rights, 1 W. & M. C. 2, A. D. 1688, condemns the proceedings.

in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses." Therefore, it was enacted, *inter alia*, "that the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." This became the law of the land, and I say that it is a violation of this law, to call these defendants in question for that which has been done by them under the authority of Parliament.

It has been said by those who have tried to support the King v.

It is urged that this judgment has never been reversed.

Williams, abandoned by Mr. Curwood, that the judgment never was formally reversed. It perhaps could not be reversed upon a writ of error, because the plea was wrong, being a plea to the jurisdiction, instead of in bar; a plea in bar was afterwards pleaded,

Reasons.

but withdrawn. That might be a sufficient reason, why, upon a writ of error, it was not reversed; but it was declared to be illegal by the three estates of the realm; and, my Lords, if it was a legal prosecution, if Speaker Williams was liable and justly prosecuted, then I say that King James was improperly dethroned,—the Revolution must be condemned,—and William the Third, our supposed deliverer, must be considered an usurper.

There has been a suspicion that this prosecution against Sir William Williams was collusively instituted and defended. I am aware that his descendant, whom I saw in Court here to-day, but who, I believe, has now withdrawn, most indignantly repels the charge, and he has furnished me with documents which most undoubtedly prove that at all events the forms were gone through of the payment of 8,000*l.* by him to the King. Having so great a respect for that descendant of his who does so much honour to the family, I should be exceedingly sorry to suppose there could be any foundation for that charge. It is a remarkable thing, however, that Sir William Williams suddenly became a great favourite with the Duke of York, when James II,—was very much en-

It has been questioned whether this was a collusive proceeding.

couraged and petted by that sovereign after the fine had been paid, and was employed by him as one of the counsel upon the prosecution of the seven bishops, where I must say, and if my right honourable Friend Mr. Williams Wynne were present, I should be bound to say it, that his conduct to the venerable defendants was harsh, overbearing, and insolent.

My Lords, it is not impossible, considering what was very commonly done at that time of day, that this prosecution really may have been collusive, although I do not by any means aver that it was so. A curious instance of a collusive proceeding of the same

As in *Skinner v. East India Company*, 3 Hats. 336, et seq. A. D. 1668,

sort occurs about the same time, in the case of

*Skinner v. the East India Company*. There, Sir

Samuel Bernardiston, a Member of the House of

Commons, was fined by the Lords 300*l.*, put into

the custody of the Black Rod, and ordered to be

detained till the fine was paid. It happened that one morning he

was desired by the gaoler to go at liberty, because the fine had been

paid; he knew nothing of it; he had never paid it, nor anybody

with his consent or privity. The payment of the fine turned out to

be a mere sham; and it was for the purpose of trying to prop up

the assumed power claimed by the Lords, of committing under these

circumstances, that they had gone through the form of pretending

that the fine they had imposed had been paid. Sir Samuel Bernar-

diston being called before the Commons and taxed with having

paid it, utterly denied all knowledge of it; and he makes a speech,

in which he declares his belief that the fine had never been paid at

all. I may likewise remind your Lordships that about that time it

was not unusual, by way of establishing an illegal toll, for the At-

torney-general collusively to file a quo warranto, and to confess

the fictitious title set up by the plea in support of it.

An attempt has been made to draw a distinction between prose-

cutions and actions for what is done by authority of

Parliament; and it is said only prosecutions are

mentioned in the Bill of Rights. Could it be in-

tended that the Speaker and Members of the House should be free

No distinction between prosecutions and actions.

from criminal proceedings, and yet be liable to actions for damages, and be placed at the mercy of a jury, and become liable to an amount utterly ruinous for an act done by them by the authority of the House? The case of the *King v. Williams*, when taken in conjunction with the Bill of Rights, is an authority to show that neither prosecution nor action can properly be brought against the Speaker, or any officer of the House, for anything done by the authority of the House.

There is another case of the same sort that occurred about the same time, *Jay v. Topham*, which was an action brought against the Serjeant-at-arms. The declaration was in the common form; for trespass and false imprisonment, in executing a warrant granted by the Speaker against the plaintiff for a breach of the Privileges of the House. The defendant pleaded that the Court ought not to have cognizance of the matter, for that being Serjeant-at-Arms to the House of Commons, he was ordered by the House to bring Jay in custody to the bar of the House, under which order he took him and brought him to the bar, which is the taking complained of in the declaration. There was a demurrer to the plea, for cause that it could not be pleaded after full defence, and that it does not answer all the matters in the declaration,—and the defendant was ordered to answer over.

*Jay v. Topham*,  
2 Nels. Abr. 1248.  
cited 14 East,  
102, n. (a.)  
34 Car. 2, A.D.  
1681.

Action of trespass  
against the Ser-  
jeant-at-arms.  
Plea.

Demurrer.

Defendant or-  
dered to answer  
over.

My Lords, after the Revolution, there were proceedings taken against the Judges who concurred in that judgment, and Sir Francis Pemberton and Sir Thomas Jones were committed for what they had done upon that occasion. They had ceased to be Judges. At the Revolution they were removed. The sentence upon them, coming immediately after the Bill of Rights, was a striking exposition of the Bill of Rights, and shows pretty strongly the opinion then entertained with regard to pro-

12 How. St. Tr.  
821. 1 W. & M.,  
A.D. 1689.

The Judges com-  
mitted and exa-  
mined by the  
House of Com-  
mons.



ceedings, either civil or criminal, for anything done by the authority of the House of Commons. There was a petition presented by Mr. Topham, stating that he had been sued for acting under the order of the House, and having pleaded pleas to the jurisdiction of the court, his pleas had been overruled. There was a reference to the Committee of Privileges, and a resolution that the judgments were illegal. Sir Francis Pemberton and Sir Thomas Jones, the surviving Judges, were ordered to attend. Now, I wish most anxiously to bring before you what was said by Sir Francis Pemberton and Sir Thomas Jones upon that occasion, and their exposition of the law.

Sir Francis Pemberton, the Chief Justice, was first brought in, and Mr. Speaker addressed him to this effect :

Examination of  
Pemberton, C. J.

“The House has been acquainted there was an action brought in the King’s Bench in Easter Term, 34 Car. 2, by one Jay against Serjeant Topham, to which action he pleaded the jurisdiction of this House, and that it proceeded to a demurrer, and the plea was overruled by you as Chief Justice.”

“Sir Francis Pemberton.—Sir, I know nothing of this action ; I have been out of the court now six years this vacation. If I saw the pleadings, it may be I might give you some account of it ; but I cannot remember so many thousand actions as were brought at that time. But if you will let me know what the charge is, I do not doubt but I can give you a good account of it. You say, Sir, he pleaded the jurisdiction of this House.

“Mr. Speaker.—That is, there was a plea to the jurisdiction of the Court of King’s Bench, that it was done by Order of this House ; *so it concerns the jurisdiction of this House.*

“Sir Francis Pemberton.—This is quite new to me, for I knew not what I was sent for. You were pleased to summon me to attend, but I did not know for what, nor do I remember any such action brought by Jay ; I remember only an action was brought by Verdon against Topham ; and I remember there was a motion made to us for a new trial in the case, where there was 500*l.* damages given ; and we did give them a new trial, for we thought it monstrous and unreasonable damages.

“ Mr. Speaker.—There were several actions brought ; but that which the House would be informed of is, the action that was between John Jay and John Topham.

“ Sir Francis Pemberton.—Under favour, I can say nothing to this action; but this I can say, if the defendant should plead he did arrest him by the command of this House, and should plead that to the jurisdiction of the Court of King’s Bench (I can say nothing to this particular action, but), I think, with submission, I can satisfy you that such a plea ought to be overruled, and, I take it, the law is very clear as to this ; but as to what is laid to my charge with respect to this particular action, if you please to give me some time to look into the records of the court.” ——— Sir Francis Pemberton was permitted to withdraw.

Then the Speaker having addressed Sir Thomas Jones, and asked him to explain ; he says,

Examination of  
Jones.

“ It is so long ago I do not remember it ; it is above seven years ago, and I had no notice at all of the cause I was commanded to attend you upon ; whether I did give any such judgment, or no, it will appear by the record itself.

“ Mr. Speaker.—We have examined the officers, and they give us an account that Sir F. Pemberton was chief justice, and you another judge then.

“ Sir Thomas Jones.—I was a Judge of the Court at that time, but I cannot certainly say we did give judgment to overrule the plea ; I hope, if we did, it was according to law.”

They are brought up again, and the Speaker calls upon them to explain ; and Sir Francis Pemberton says, “ As to the question concerning this particular case, I know nothing ;” but afterwards he says, “ I did not speak of an order of the House in general, but the order that was in this case ; of the order of taking him into custody ; that was the question proposed to me. I had no reasons to speak of the orders of the House in general ; I can give no account of them ; but it is *quoad hoc* whether the order for taking them into custody was pleadable to the

p. 824.  
Re-examination  
of Pemberton,  
C. J. They ex-  
cuse themselves  
on the ground  
that there was a  
plea to the juris-  
diction, and not a  
plea in bar ;

jurisdiction? I did apprehend, by the law, it was not pleadable; if I was understood in any other sense, I beg your pardon; for I spake it *quoad hoc* (that is, merely as to the form of the plea). The case of Jay it is, I think, which was, it being the order of the House to take him into custody, that being pleaded to the jurisdiction of the Court of King's Bench, whether that ought to be allowed or no? Therefore, if it be looked upon as if I spake in general, I did not adapt my words as I should, but that is my meaning." "I must premise this to you, that the jurisdiction of this House I do not take to be in question, nor the validity of their orders. I think there is no Judge that understands himself, but will allow the Privileges of this House; they are the privileges of the nation, and we are all bound to maintain them as much as any Member of the House; but the question is here now *de modo*. *It is agreed on all hands the taking him into custody is justifiable*, but the question is (*de modo*) whether pleadable by way of jurisdiction or in bar; and therefore I do not look upon the Privileges of this House as at all in question: I only state what I apprehend the state and matter to be."

and admits, if it had been the latter, it would have been a defence.

Then he goes on to lay down, in the most explicit manner, that if the plea had been a plea in bar, it would have been a good defence to the action, and there would have been judgment for the defendant.

12 How. St. Tr., p. 829.

On a subsequent day he says, "We did not question the legality of your orders, nor the power of them; but the great business was, whether he had pursued this order of the House of Commons, and that was the thing properly examinable; but on the other side it would be a monstrous mischief to the plaintiffs, if such a plea was allowed to the jurisdiction; for it would be agreed on all hands if Mr. Topham had abused his authority, and done any outrageous thing, then it would be recognizable by the Court."

p. 831.

Sir Thomas Jones concurs in that law, that if there had been a plea to the jurisdiction, it ought to have been overruled; but a plea in bar would have entitled the defendant to the judgment of the Court, and the Court could not take

cognizance of the proceedings where upon a plea in bar, the authority of the House of Commons is alleged for the act complained of. Pemberton and Jones were nevertheless ordered into the custody of the Serjeant-at-Arms.

My Lords, there has been some complaint of the treatment they experienced, upon a supposition that the statement was true,—that

It turns out there  
was a plea in bar.

it was only a plea to the jurisdiction which they overruled; but, my Lords, upon inquiry, it turns out there was a plea in bar which had been overruled, and that they really had wantonly or corruptly decided against the

Privileges of the House of Commons. In Nelson's  
2 Nels. Abr. 1248.

Abridgment, there is an account, my Lords, of this case, showing that there had been a plea in bar, which confirms Topham's petition to the House of Commons, stating the plea in

bar had been overruled; and further, it appears from  
2 Nels. Abr.  
the account of the case in Nelson's Abridgment, that it was not a special demurrer for cause, but a general demurrer.

Lord *Denman*.—Have the records in Court been searched?

Mr. *Attorney-General*.—The Treasury has been searched, and it appears the record in this action is not to be found. Along with others it had been removed to the House of Commons, and never

restored; they are not forthcoming; but Topham  
Sir T. Topham's  
petition, 164. 10  
Com. Journ. p.  
104.

in his petition to the House of Commons, states that he had pleaded in bar, and that it had been overruled, and this account in Nelson's Abridgment confirms that statement in the petition as it appears in the journals. Therefore, my Lords, Pemberton and Jones are not exactly, if that be true, such objects of pity as they are represented to be, and the conduct of Parliament was not so harsh and tyrannical as it has been supposed; for it appears, that they did in an arbitrary manner overrule the plea that had been well pleaded, and they must have done so consciously and knowingly for an improper purpose, knowing they were violating the law. The leaders of the Convention Parliament, to whom this country is indebted for

its liberties, were not men to persecute the innocent, and their reputation is not to be blackened for the purpose of screening delinquent Judges.

There is another case of *Verdon v. Topham*, which was an action brought against Topham, the Sergeant-at-arms. It is thus reported: Trespass of assault, battery, and imprisonment, until the Plaintiff paid 60*l*. The defendant pleaded to the jurisdiction, for that the trespass, &c. was done by order of the knights, citizens, and burgesses of the Commons House in Parliament assembled, to the defendant, being their Serjeant-at-arms, to bring the plaintiff before them *propter diversa malefacta* by him committed, about an election of knights to serve in Parliament, and therefore the matter ought to be examined and determined there."

*Verdon v. Topham*, T. Jones, 208. 34 Car. 2, A.D. 1681.

Similar action as the last.

Plea to jurisdiction overruled.

This is clearly a plea to the jurisdiction of the Court, and it is curious that Williams, who had been prosecuted himself, and paid his fine, became counsel for those who were in *pari delicto*. Williams, who had been Speaker, and was now practising at the bar, was the counsel for Topham. How he argued it, I do not know; whether he argued like Pollexfen, his own counsel;—for there is no detailed account of his argument; but, however, there does not appear to have been a very long discussion; he "urged that the plea was good, and prayed time till the next term to speak to it. But the Court would not grant it, but awarded that the defendant should answer over."

My Lords, the only other case of this sort is an action of *scandalum magnatum*, brought by Lord Peterborough against Williams, the Speaker, because in "Dangerfield's Narrative" there were some reflections upon his Lordship. This also appears to have been a very rapid proceeding. The defendant pleaded the same plea as in the *King v. Williams*, to the jurisdiction of the court; there was no judgment whatever; the case was compromised; a sum of money is supposed

*Lord Peterborough v. Williams*, 2 Show, 505. 13 How. St. Tr. 1437. 2 & 3 J. 2, A.D. 1686.

Action of scandal against Speaker for publishing Dangerfield's Narrative compromised.

to have been paid to Lord Peterborough, and the prosecution was dropped. Therefore that cannot be any authority, either one way or the other; and if there had been a judgment against the Speaker in that action of *scandalum magnatum* it would have been of no importance, because it must have been considered illegal, just as much as the prosecution by the Attorney-general, which Mr. Curwood condemns.

My Lords, there was a prosecution against Dangerfield himself, for the publication of this Narrative. I can no where find an account of the trial. It no where appears for what act of publication he was prosecuted,—or when the publication complained of took place,—or to whom,—or under what circumstances. It may have been for a publication before the Narrative was presented to the two Houses and ordered to be printed by the House of Commons. It may have been for a publication at a subsequent time, which the order of the House of Commons would not cover. If it was for the single act of presenting the narrative at the bar under the sanction of the House, then the prosecution was for something done in Parliament, and was, if possible, more illegal and atrocious than the prosecution against the Speaker for signing the order that it should be printed. The spirit in which the trial was conducted may be surmised from the sentence; which was, that the defendant should be imprisoned, and several times set in the pillory. It appears, that one Frances, a barrister of Gray's Inn, was tried for the murder of Dangerfield as he was returning from one of these exhibitions in the pillory; there were some taunting words passed between them,—when Frances assaulted Dangerfield, and ran a cane into his eye,—of which wound he died. Frances was tried for the murder, convicted and executed.

Rex v. Dangerfield, 3 Mod. 68, 11 How. St. Tr. 603, A.D. 1685.

Dangerfield convicted for publishing Narrative, and sentenced to pillory. Murdered.

My Lords, all the cases that occurred at that time in the reign of James II. must be considered as authorities in support of the positions for which I contend, for all those proceedings have been reprobated in all succeeding times.

The Act of Parliament for reversing the judgment in the *King v.*

Bill introduced to reverse the judgment in *Rex v. Williams*.

Reasons why it did not pass.

*Williams* did not pass; by reason that it was intended that Sir Robert Sawyer, the Attorney-general, who prosecuted him, should be made to reimburse him for the amount of his fine. The Bill passed the

House of Commons; and I believe the reason why it did not pass the Lords, was the difficulty respecting the fund out of which *Williams* was to be reimbursed,—the supporters of the Bill finding it difficult to say, that Sir Robert Sawyer should be liable to him personally for the unjust sentence of the Court.

But, although the *King v. Williams* was neither reversed by writ of error, nor by Act of Parliament, such an Act, as far as the general law was concerned, was unnecessary; the decision had been reversed by the Bill of Rights. The object of the private Act was to indemnify the Speaker.

My Lords, I now come, *per saltum* to the case of *Burdett v.*

*Burdett v. Abbot*, in K. B. 14 East, 1, A. D. 1811; in Exch. Chamber, 4 Taunt. 401; House of Lords, in 5 Dow. 165, A. D. 1817.

*Abbot*; for after the Revolution down to the time when that case arose, there is not the slightest trace of any action being brought in Westminster Hall for anything done by the authority of either House of Parliament. There were writs of habeas

Action of trespass against Speaker for issuing warrant for plaintiff's arrest.

corpus in *Paty's* case, in *Murray's* case, in the case of *Oliver*, in the case of *Brass Crosby*, in the case of *Flower*, and in the case of *Hobhouse*; but Sir Francis *Burdett* is the first who brought an action since the Revolution for an act of

either House of Parliament. I do think this decision must be considered a conclusive authority to show that the present action cannot be maintained.

That action was trespass and false imprisonment; this is case for a libel: but they rest upon the same principles. It was held in that case that the question arose directly; and Mr. Justice *Holroyd* (then at the bar), who argued the case most ably, only attempted to establish the jurisdiction of the Court on the assumption that the question arose incidentally.

Plea, justifying under order of House of Commons.

Demurrer, action held not maintainable.

Mr. *Holroyd*, for

the plaintiff, endeavoured to show the question arose there incidentally, 14 East, pp. 15, 16.

He brings forward a number of arguments and authorities to show, that where the question arises incidentally, the Court has jurisdiction ; but he altogether failed to do what was impossible,—to show that the question there arose incidentally ; it arose directly, and the Court had not jurisdiction. He says, in the course of his argument, “ But supposing the law of Parliament were a distinct law, superseding the Common Law, like the Civil or Admiralty Law, still it would be necessary for this Court, upon the question arising *incidentally or collaterally* before them, to judge of the law and custom of Parliament, in the same manner as it does of the Civil or Admiralty Law when brought in question judicially before it, in order to ascertain to what extent the one supersedes the other, and the bounds of each of them respectively.” The only manner in which he thought he could get the Court to take cognizance of the question, was to contend that it arose *incidentally*.

Sir Vicary Gibbs, then Attorney-general, took the ground, that the action was for an act done by the House of Commons, and that there was no difference between a *habeas corpus* and an action, the question being the same in both,—showing that all those cases in which it was held that upon *habeas corpus* the Courts of Common Law cannot inquire into the Privileges of Parliament, are equally authorities to show that in an action brought for an act of either House this Privilege cannot be inquired into.

My Lords, if the House of Commons had done what, following many precedents, both in Parliament and in the Courts of Common Law, they clearly might have done ;—if they had committed Mr. Stockdale for bringing the action,—according to all those authorities he could have had no redress ; upon the return to the *habeas corpus*, he must have been remanded ; and it does seem strange that he should be allowed to prosecute this action, when, under the circumstances that I state, the Court could not have discharged him from his imprisonment for bringing it.

But, my Lords, I wish to show how this case of *Burdett v. Abbot*



p. 81.

was argued on both sides. Mr. Holroyd contended it arose incidentally. Sir Vicary Gibbs says, "The

very statement of this case, without going at all into the argument derived from the long train of authorities cited, puts the plaintiff out of the Court."—"It was not, therefore, correctly argued

p. 82.

for the plaintiff, that though the Court refused to

discharge a party upon *habeas corpus*, it did not follow that an action of trespass would not lie, and that though the prisoner were not entitled to his discharge upon the *habeas corpus*, yet that upon the same facts, he might support an action of trespass. The converse of that proposition is true: in no case would trespass lie, where the party would not be entitled to his discharge upon a *habeas corpus*, though it does not follow that in every case where the party was entitled to his discharge upon the *habeas corpus*, an action of trespass would lie."

Your Lordships will find that Lord Ellenborough considers that the question arose *directly*, and he is very much guided by that supposition.

Opinion of Bayley, J., p. 65.

In the course of the argument Mr. Justice Bayley puts this question,—“If the Court of Common Pleas were to commit for a contempt, would an action lie against the officer, and would this Court try, in such an ac-

tion, whether or not the party had been guilty of the contempt? I put that case; as an answer to it, one way or the other, may apply strongly to the present."

Opinion of Lord Ellenborough C. J., 14 East, p. 67.

Lord Ellenborough says, "Do you find in any of the cases where the Court have refused to liberate the party on the *habeas corpus*, that they have referred him to another remedy by action?" No such authority could be

adduced.

p. 96.

Again, Lord Ellenborough says, "What distinction do you take between a *direct* and an *incidental* question of Privilege?—I take the question of Privilege to come *directly* in judgment before the Court, upon an application for the party's discharge upon *habeas corpus*."

My Lords, this was a clear intimation from Lord Ellenborough that it would have come equally directly in question in an action of trespass and false imprisonment ; that there was no distinction between the two ; that it arose directly in both ; and that this Court was bound by what the House of Parliament had done.

Mr. Justice Bayley also says, “ You have not answered the question whether an action could lie in the Court of Common Pleas against an officer of this Court executing its warrant of commitment for a contempt, to question the legality of such a commitment ; and I may also ask whether an action would lie against the Judges, or either of them, who signed the warrant ? ” — “ The warrant is issued by the authority of the House of Commons, and as their act ; but they order the Speaker, as their principal Member, to sign it.” And Lord Ellenborough adds, “ You must make them all trespassers, or none. If the one who signs the warrant be liable, all who commanded the act to be done must be equally liable.

Bayley, J. p. 123.  
p. 127.  
Lord Ellenborough, C. J.

So I say here ; if an action lies against Mr. Hansard, it lies against the Speaker ; and if it lies against the Speaker, it lies against all the Members who gave the order. This is demonstration that the action is brought for what is done in Parliament.

I will finally refer to what fell from Mr. Justice Bayley in delivering judgment. He quotes and approves of what Lord Coke had said, that the House of Commons was a Court of Judicature, and adds, “ It is also admitted that an action would not lie against the Members of the House for anything done as such ; and if no such action will lie, I think that makes an end of this question ; for it appears to me that the Speaker, in issuing the warrant, which he has done by order of the House, did not act in the character of a subordinate officer, but in the character of a Member of the House. But if it were the act of an officer of the House acting under and by virtue of its judgment on the subject matter, I cannot help thinking that where a Court has competent jurisdiction to decide upon a point, and has

Judgment by Bayley, pp. 159, 160.

decided and given judgment upon it, and they direct their officer to carry that judgment into execution, the officer is protected by that judgment. If the Court have ordered him to do that which was within their jurisdiction to order, he is bound to obey their order ; but it is said, that the Privilege of Parliament is examinable in this Court, and that it ought to have been averred, that this party was guilty of the contempt, stating it as a traversable fact which might be tried again elsewhere against those who acted under the authority of the House of Commons. If that were so, the fact would be examinable not only in this Court, but in every inferior Court throughout the kingdom in which an action of trespass could be supported. Then, as the Courts of Justice must be considered as standing in the same situation in respect to their judgments as the House of Commons stands with respect to its own orders, it must also be contended, that if this Court were to adjudge a party to be guilty of contempt, and were to direct an attachment to issue against him, and to commit him for that contempt, any other Court, however inferior, might try the same question again in an action of trespass, because it would be said to rise incidentally, whether or not the party was guilty of that fact of which this Court had adjudged him to be guilty, and whether that fact was a contempt of this Court. I cannot see how to stop short of going that length if this action can be supported."

This is meeting Mr. Holroyd's argument, that it arose *incidentally*. No, says Mr. Justice Bayley, it does not, otherwise it might be said, wherever there is an action brought for a commitment for a contempt, that it arises incidentally, and you might inquire whether a contempt had been committed or not.

He further says, "These cases upon the *habeas corpus* Act were attempted to be distinguished from this, by relying upon expressions made use of by some of the Judges, that although they could not question judgments of commitment by the House directly, yet that when those judgments came incidentally before them, they would have full power to examine into them ; and then it is assumed, that in this particular case the

14 East p. 161.

question arises incidentally. Now, as it appears to me, the very object of this action is to make a direct attack upon the judgment of the House of Commons, and to bring that matter, and that matter only into question; and would it not be absurd to say, that though we cannot discharge the party committed from his imprisonment, because that would be directly arraigning the judgment of the House, yet that he shall have an opportunity of recovering by action full satisfaction for lying in prison, and that in giving such satisfaction, the judgment of the House is left where it was. But it seems to me that the giving the party full satisfaction for his imprisonment is, in legal contemplation, to do away all the punishment he has received; and if that be not bringing into question again the judgment of the House, I cannot understand how the point can be more directly brought into question."

Therefore the Privilege of the House was directly brought in question, and, being so brought in question, the Court had no jurisdiction, and it was held there must be judgment for the defendant. And what difference is there between an action of trespass for the act of committing a man to prison, and this action upon the case for publishing an alleged libel, which is an injury not to the person, but to the reputation? The question arises just as directly in the one instance as in the other. If it arises directly, even Mr. Holroyd, (a person so pre-eminently versed in the law, I may say of almost unexampled learning, and whose arguments at the bar are worthy of being studied,) being counsel against Privilege, admitted, that unless he could show that the question arose incidentally, the Court had no jurisdiction. The Judges there said it arose directly; if it arose directly there, it arises directly here. If it arises directly, according to the admission of Mr. Holroyd, against the interest of his client, the action cannot be maintained.

My Lords, this case, as well as the case of *Burdett v. Colman*

*Burdett v. Colman*, in K. B. 14 Ea. 163; in H. L. 5 Dow. 170,

was carried by Writ of Error into the Exchequer Chamber. *Burdett v. Colman* was an action brought, not against the Speaker, but against a person who

was an officer of the House, and not a Member. The same plea was pleaded there: it was not demurred to; there was a replication or new assignment of excess, upon which a verdict for the defendant passed. The case was afterwards brought by Writ of Error before the Court of Exchequer Chamber, and then before the House of Lords, where there was an elaborate argument by the counsel of Sir Francis Burdett. Now *Burdett v. Colman*, I think, is material to show, that there is no distinction between an officer of the House and a Member of the House; that where the Member has protection, the officer has the like protection; that the question presented to the Court is precisely the same whether the action is brought against an officer of the House, or a Member of the House. Although there was not a demurrer to that plea, it was taken to the Superior Court by Writ of Error; and if the plea was bad, there was an opportunity of entering up judgment for the plaintiff, notwithstanding the verdict; but it was held that the defence was equally available to Mr. Colman, the officer, as it was to Mr. Abbot, the Speaker of the House. The Exchequer Chamber affirmed the judgment of this Court, and the House of Lords affirmed the judgment of the Exchequer Chamber; and Lord Eldon put a question to the Judges, which shows that Lord Eldon and the Judges thought there was no difference between a *habeas corpus* and an action.

A.D. 1811-17.  
Action against the  
Serjeant-at-Arms  
for executing the  
Warrant.  
Same plea.  
Replication of  
Excess. No dis-  
tinction as to  
liability between  
Speaker and offi-  
cer of House.

The question put by the House of Lords, through Lord Eldon, to the Judges was this:—"Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally, without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would discharge the prisoner, because the particular

Question put by  
House of Lords  
to Judges.  
5 Dow. 199.

facts and circumstances out of which the contempt arose, were not set forth in the warrant?"

And the Judges delivered their unanimous opinion, that in such a case the Court of King's Bench would not liberate. The House, acting upon their answer, thought there was no difference between a *habeas corpus* and an action as to taking cognizance of what was done by either House; and, without hearing the other side, the judgment below was affirmed.

Now, my Lords, I can make the case of *Burdett v. Colman* quite identical with the present. Suppose, instead of an action of trespass by Sir Francis Burdett, there had been an action on the case for a libel against Mr. Colman for publishing the warrant, because he carried it from the House of Commons to Piccadilly, and there exhibited it, when he demanded admittance into the House—it would have been necessary for Mr. Colman to justify, just as it is necessary for Mr. Hansard here, that the act complained of was done by the order and authority of the House;—he would have stated the Resolution of the House, that Sir Francis Burdett should be committed; that the Speaker issued his warrant for that purpose; that the warrant was delivered to the defendant to be executed; and that the warrant, so issued by the authority of the House of Commons, was the supposed libel mentioned in the declaration, *absque hoc* that he published it upon any other occasion,—and demurred thereupon. Here we have the two cases identically the same. I do not see how my Learned Friend, in his reply (if he will vouchsafe to advert to this argument) can in the slightest degree distinguish the cases. If it had been an action upon the case, brought by Sir Francis Burdett against Mr. Colman for a libel, with justification and a demurrer, can there be a doubt that the judgment of this Court, and of the Exchequer Chamber, and of the House of Lords, would have been exactly what it was in the action of trespass and false imprisonment? Can there be a doubt that there would have been the same result, and that Lord Ellenborough and Mr. Justice Bayley would have said the action was

That would have been identical with the present, if the plaintiff there had treated the Speaker's Warrant as a libel, which he might have done.

brought to question the power of the House of Commons, and that they could not overrule what the House of Commons had done? Then, my Lords, if they would have given that judgment upon those grounds in an action upon the case for a libel, with a justification, that case is an express authority here, and shows that the present action cannot be maintained.

Lord C. J. *Denman*.—I do not know that it is worth while to make the observation, that *Burdett v. Colman* did not go beyond this court; it was tried upon a new assignment, before Lord Ellenborough.

Lord *Brougham*.—It never came to the House of Lords. I was counsel in *Burdett v. Abbot*; Mr. Clifford argued it in the Exchequer Chamber, and he died before 1817.

Lord C. J. *Denman*.—It is better to have these things set right.

Mr. *Attorney General*.—I am much obliged to your Lordship for correcting me, if I have fallen into any error. I have taken the best pains I could to be accurate. The report is in 5th Dow. page 165; from which it appears that both cases were before the House of Lords, *Burdett v. Abbot* and *Burdett v. Colman*; they came on together; so it appears by the report that is in my hand.

Mr. Justice *Coleridge*.—If so, I suppose you find the judgment in both.

Mr. *Attorney General*.—*Burdett v. Abbot* and *Burdett v. Colman* are both reported.

Lord C. J. *Denman*.—It is desirable to know how the fact was. In *Burdett v. Abbot*, the necessity of calling in the soldiers was decided; they were called in, and that was made a great point.

Mr. *Attorney-General*.—After the verdict as to the excess in *Burdett v. Colman* and error brought in both cases, there is no distinction made between the two in the course of the argument. In *Burdett v. Colman*, there was an opportunity of making the distinction, if it could have been supported, between a ministerial servant of the House and the Speaker, or the Members of the House; but it was held, that the protection applied to the officers of the House just as much as to the Members of the House; and,

therefore, the case of *Burdett v. Colman* must be considered, I apprehend, on all fours with *Stockdale v. Hansard*.

My Lords, I will next call your attention to cases where, certainly, if any such action could have been brought, it would have been brought: I will show your Lordships that it is quite unnecessary any such action should be brought, and that without the interference of the Courts of Law any excess or abuse of Privilege will receive a constitutional remedy. Now, if such an action for anything done by the Houses of Parliament ever could have been brought, it certainly would have been brought in the proceedings that arose out of *Shirley v. Fagg*. That was a dispute between the Commons and the Lords respecting the appellate jurisdiction of the House of Lords in equity suits, where a Member of the House of Commons is a party; and there can be no doubt, that although this jurisdiction now belongs to the House of Lords, and is very usefully exercised, it is of very recent origin. Lord Hale says he can find no instance of it prior to the reign of Charles or James I.

There was a great dispute in this case of *Shirley v. Fagg*, as to whether a Member of the House of Commons could be compelled to appear at the bar of the House of Lords as a party to an appeal in an equity suit. Sir John Fagg, a Member of the House of Commons, Parliament sitting, was served with an order of the House of Lords, made on the petition of Dr. Shirley, to put in an answer to the petition of appeal. There was a complaint to the House of Commons by him of a breach of privilege, and on the 14th May the Speaker's warrant was issued to arrest Dr. Shirley for a breach of Privilege in prosecuting the appeal. Dr. Shirley escaped from the Serjeant-at-Arms, and there was a new warrant directed by the House of Commons to arrest Dr.

Cases where no actions were brought, but the Houses of Parliament have themselves redressed injuries inflicted by them.

*Shirley v. Fagg*,  
6 How. Sta. Trl.  
1121,  
27 C. 2, A.D.  
1675.

Defendant, Member of the House of Commons, served in House in order to appear as party to an Appeal in the House of Lords. Plaintiff held in contempt. Plaintiff and his Counsel committed by House of Commons. Released by House of Lords. Defendant Committed by House of Commons, for appearing in House of Lords. Writs of Habeas Corpus sued out, but no action.



Shirley, and then Mr. Serjeant Pemberton, Sir John Churchill, Mr. Serjeant Peck, and Mr. Porter, who were counsel for Dr. Shirley, were ordered to be taken into custody by the Serjeant-at-Arms, for acting as counsel in the appeal in the Lords against the orders of the House. What did the Lords do? they ordered the Black Rod to release them; they were released, and protection was granted to them by the Lords. Mr. Serjeant Pemberton, Sir John Churchill, Mr. Serjeant Peck, and Mr. Porter, were again taken into custody by the Serjeant-at-Arms in Westminster Hall in the Court of Chancery, and all sent to the Tower. Here is a collision between the two Houses indeed! Sir John Fagg<sup>r</sup> was sent to the Tower for appearing to the appeal in the Lords. There were four writs of *habeas corpus* returnable before the House of Lords to the Lieutenant of the Tower, but the Lieutenant of the Tower refused to obey those writs of *habeas corpus*, because the commitments were by the Commons, and so the dispute continued; the Commons insisted upon taking into custody those who acted as counsel, and the Lords insisted upon discharging them, treating as guilty of a breach of Privilege any person who should interfere with the proceedings in the appeal.

Now, my Lords, upon this occasion, if it had been thought that an action at law could be maintained, can there be any doubt, that it would have been brought—would not Mr. Serjeant Pemberton, Sir John Churchill, Mr. Serjeant Peck, or Mr. Porter, have brought an action against the Serjeant-at-Arms for illegally arresting them? It would have been tried in the form of an action, whether the process of the Lords or the Commons ought to prevail. But no action was brought. Why? because it was felt, that however arbitrary, and however oppressive this proceeding might be, an action at law was not the proper remedy; that the proper remedy was an application to the two Houses of Parliament; that the only course was to wait until these heats should subside, expecting that either the one House or the other would review its decisions, and would do justice to the parties injured. My Lords, that hope was not vain; for, a little time being given for consideration,

the two Houses settled their controversy, and it was acknowledged, that the House of Lords had this jurisdiction, without any action at law being brought to try the question. The House of Lords from that time to this has quietly enjoyed the jurisdiction in appeals, from courts of equity, without regard to whether the parties are, or are not Members of the House of Commons. My Lords, Mr. Serjeant Pemberton and the other parties arrested in the Court of Chancery did not apply for a writ of *habeas corpus* in Westminster Hall ; they did not apply to the Chancellor to relieve them, and they must have been convinced that the Chancellor had no jurisdiction on the subject, and that no action could have been maintained to try the liability of these proceedings.

My Lords, it may be very easily admitted, that these proceedings are not morally to be justified ; but then the question is, whether the Judges sitting in Westminster Hall, upon an action being brought, could give redress. The general opinion of that day clearly was, that they had no such jurisdiction. With the exception of the prosecution against Sir William Williams, and the actions against Topham, there is not, either in ancient or modern times, the slightest trace of any such action being brought ; and when my Learned Friend, Mr. Curwood, brings forward a list of supposed abuses of Privilege, it being considered that no action ever was brought for any of those supposed abuses, they are the strongest confirmation of the doctrine for which I contend.

Mr. Curwood says, that the people were frightened by the House of Commons, that it is a spectre, but when opposed it vanishes into thin air. Our ancestors knew full well what their rights were, and were ever ready to appeal to the Courts of Law in support of them, either against the Crown or the Parliament. Hampden tried his liability to pay ship money ; Lord Shaftesbury sued out his writ of *habeas corpus* ; Patey sued out his writ of *habeas corpus* ; Flower, Crosby, Murray and Hobhouse, all sued out their writs of *habeas corpus*, and tried as far as they could to question what had been done in the House of Lords, or in the House of Commons ; and if there had not been the strongest conviction that no action

could be maintained for an act of either House, it is most unquestionable that an action would have been hazarded. I may remind your Lordships of what is said in Littleton, respecting the statute of Merton, that the not bringing an action where it might be brought, if maintainable, is the strongest evidence that no such action lies.

Now, my Lords, I proceed to review the cases from which it is supposed that a contrary doctrine is to be inferred but I will venture to say, my Lords, that in no one of those cases is there to be found any thing to shake the authority of the cases on which I rely.

Cases supposed favourable to the plaintiff.

I begin with Atwyll's case, one of the cases where the Commons, instead of doing justice at once themselves, and asserting their Privileges, called in the assistance of the Lords;—and this class of cases has been brought forward to show that the House of Commons is not a court of exclusive jurisdiction upon the subject of Privilege. But none of these cases have any tendency to show that any of the Courts of Common Law have any jurisdiction; and it will be found, that although there was an application to the Lords, it was merely in the nature of a conference between the two Houses—the Commons taking the advice of the Lords as to the course that ought to be adopted in a case in which they were jointly interested. Atwyll's case was a petition of complaint, which states that there was a custom that Members were not to be impleaded in any action personal, nor to be attached by their persons or goods in their coming to any Parliament, there abiding, nor from thence returning to their proper home; that Atwyll, the Member for Exeter, was sued in the Exchequer by John Taylor, and writs of *fieri facias* and *ca. sa.* being sued out against him, it was ordered by the Parliament that those writs should be superseded, saving to John Taylor, execution of the writs after the end of the Parliament;—and the answer to the petition is “*Le Roy le voet.*”

Atwyll's case. 1  
Hats. 48. 17 E. 4.  
A.D. 1477.

The redress afforded was in the form of an Act of Parliament, and

one object of the Act of Parliament in this case was to do justice to the judgment creditor, because at Common Law, where there was a discharge of a debtor by reason of Privilege, the debt was gone. I must say, in justification of the proceedings of the House of Commons, that from the earliest time they have been most anxious to reconcile their Privileges with what was just and fair to individuals. When they directed that a Member should be discharged on account of Privilege, until the general law upon the

subject in the beginning of the reign of James the  
 Stat. 1, J. 1, c. 13. A. D. 1603. First, they passed an Act of Parliament in each particular case, stating that after the Privilege ceased the debt should be revived, and new process of execution might be sued out.

In Larke's case, there was a petition by the Commons, stating that William Larke a servant to William Milrede, a Member of Parliament, had been arrested while coming with his master to Parliament, and lodged in the Fleet, and praying that he should be discharged, saving right of execution on judgment to the creditor after the end of the Parliament, and also praying for a general enactment in future. There was a special answer by the King with the advice of the Lords Spiritual and Temporal, that Larke should be discharged, and that the creditor should have execution afterwards. That is another instance of the same mode of proceeding.

Larke's case.  
 1 Hats. 17,  
 8 Hen. 6.  
 A. D. 1429.

Member's servant  
 arrested. Same  
 proceedings.

Then, my Lords, comes the case of Clarke, Member for Chippenham, who was arrested during Parliament at the suit of the Crown, and likewise of a private creditor. There was a petition to the King in Parliament to discharge Clarke by writ of Privilege, saving execution thereafter both to the Crown and the private creditor; the King gave his assent, and the former mode of proceeding was adopted.

Clarke's case.  
 1 Hats. 24.  
 39 H. 6, A. D.  
 1460. Member  
 arrested.

Hyde's case is nearly the same; and shewed an anxiety on the part of the Commons that justice should be done to

Hyde's case.

1 Hats.  
14 E. 4, A. D.  
1474. Same ef-  
fect.

the creditor as well as that the Member should be set at liberty.

Prior of Malton's  
case. 1 Hats. 12,  
9 E 2, A. D. 1315.

There is a case sometimes cited as unfavourable to Privilege, which I think it my duty to mention to your Lordships, though I do not see how it bears upon the subject—it is the Prior of Malton's case.

There was a writ to the sheriff of York for commencing an action in the King's Bench against Walter Le Fleming and others; it recites that all persons (Members of Parliament) coming to staying at, and returning from Parliament, ought to be free from all injuries, &c., yet the defendants arrested the Prior of Malton in the City of York returning from the Parliament at Malton, by his horses and harness; nothing more appears upon the subject, and we only learn that in the time of Edward the Second there was a claim for the goods of Members of Parliament to be privileged while Parliament was sitting and on their journey home, and that a party whose horses and harness had been seized commenced his action in a Court of Common Law for redress.

Trewynnard's  
case. 1 Hats. 60,  
36, H. 8, A. D.  
1544.  
Member of Par-  
liament in execu-  
tion for debt dis-  
charged by order  
of House of Com-  
mons.  
Action against  
Plaintiff for es-  
cape.

Next we have Trewynnard's case. That was an action of debt by the executors of one Skewes, against the Sheriff of Cornwall for the escape of Trewynnard. The declaration set out the judgment against Trewynnard for the debt due to Skewes; that there was a *ca. sa.* against Trewynnard, and an alleged escape after he was taken in execution. Skewes obtained a judgment against Trewynnard, and Trewynnard was taken upon the *ca. sa.*; he was discharged by order of the House of Commons, and then the executors of the judgment creditor bring this action. The plea was, that Trewynnard being in the custody of the sheriff, a Writ of Privilege was directed to the sheriff, alleging that Trewynnard was a burgess of Hellstone, and was coming to Parliament, when he was arrested at the suit of Skewes, and ordering him to be discharged,—by virtue of which writ

Trewynnard was suffered to go at large. There was a demurrer to that plea. No judgment appears, but

No judgment.

1 Dyer, 62.

there was an argument by that great lawyer Dyer, for the sheriff. The concluding position in that argument I hold to be good law, and to be strongly applicable to this case, for he thus contends :—"That although Parliament should err in granting this writ (that is, in setting a Member at liberty), yet it is not reversible in another Court, nor is it any default in the sheriff."

Donne v. Walsh,  
1 Hats. 41,  
12 E. 4, A. D.  
1472.

Motion against  
servant of Peer.  
Plea of Privilege.  
Held no such Pri-  
vilege.

Then comes *Donne v. Walsh*. That was an action of debt on bond, in the Court of Exchequer, by Donne against Walsh, servant of Henry Earl of Essex. There was no arrest, but the complaint was, that the servant of a Peer was not liable to be sued during the sitting of Parliament. There was a Writ of Privilege, and the Writ sets out the custom, that neither Lords, nor knights of shires, &c., nor their servants, coming to Parliament, ought to be arrested or impleaded, (*aut implacitari*,) and that there should be a *supersedeas* of the suit to deliver the servant from prison if imprisoned. The defendant says, that he was, at the time in question, the servant of the said Earl, and came with him to the said Parliament therefore he prays judgment ;—and concludes to the Court. There was a replication by the plaintiff, which prayed that the writ might be disallowed, for this, that there is not, nor ever was, such a custom as is in the writ specified and recited. The barons having consulted the justices of both benches, find the custom not to arrest Members or servants in time of Parliament, but no such custom as that they may not be impleaded ; therefore it is considered that the writ be disallowed, and that the defendant answer notwithstanding the Writ of Privilege.

Now your Lordships will see in a moment, that here the question arose incidentally, and the Court could not avoid considering it ; the servant of the Earl of Essex is sued ; he pleads in abatement that he is not liable to be sued during Parliament. The Court was bound to say whether the action was to be stayed or to proceed.

Question arose  
incidentally. No

That was not an action brought for any act done by the House ; it was a question of personal Privilege

act of the House  
questioned.

claimed by the defendant; it was a question respecting the practice of the Court, of which the Court might take notice, and therefore it is no authority to show that where an action is brought, as in *Burdett v. Abbot*, and in *Stockdale v. Hansard*, raising the question of the validity of an act done by either House in the exercise of Privilege, the Court has any jurisdiction.

*Ryver v. Cosins* is another case exactly of the same sort; the defendant pleads the King's writ, as in *Donne v. Walsh*, and says, that persons are not to be impleaded sitting Parliament. There was a replication, and the plaintiff prayed that the writ should be disallowed, because there was no such custom as *minime implacitari*, it was only *non arrestari*; and the same judgment was given in that case as in *Donne v. Walsh*,—and, my Lords, for the same reason, that the question merely arose *incidentally*, and no act or authority or judgment of the House of Commons came in question.

*Ryver v. Cosins*,  
1 Hats. 42, 12 E.  
4, A.D. 1472.  
To the same effect.

Next, my Lords, we have *Pledall's case*, where there was a complaint by the Commons of a breach of Privilege, that Gabriel Pledall, a Member, was bound in recognizance in the Star Chamber to appear before the council in twelve days after the end of the Parliament. Upon this there was a conference between the two Houses, and the result was, that the Speaker and those who attended as managers reported, that the chief justices, &c. affirmed that the recognizance was no breach of Privilege, in which the Commons acquiesced. My Lords, this case proves nothing, except that binding a Member of Parliament, Peer or Commoner, in the Star Chamber to appear there after the end of the Session to answer for something unconnected with his character as a Member of Parliament, was no breach of Privilege.

*Pledall's case*,  
*Prynne's Reg.* 4th  
part, 1213; (cited  
14 East, 47); 2 &  
3 Phil. and Ma.  
A.D. 1556.

Both Houses re-  
solved that bind-  
ing a M. P. to ap-  
pear in Star  
Chamber after  
Session, was no  
breach of Privi-  
lege.

We then have *Cooke's case*, which is as follows:—Richard Cooke, a Member of Parliament, was served with a subpoena. The House ordered certain Members, attended by the

*Cooke's case*, 1  
Hats. 39, cited O.

Bridg. 351, 26  
 Eliz. A.D. 1582.  
 Question whether  
 Members of Par-  
 liament could be  
 served with  
 Subpœna.

Serjeant, to go to the Court of Chancery, and signify to the Lord Chancellor and Master of the Rolls, that by the ancient liberties of the House Members were privileged from being served with a subpœna, and request him to discharge the appearance of Cooke ; and that in future the like Privilege should be granted to other Members served with subpœnas upon the request of the House signified under the Speaker's hand. The Lord Chancellor sent for answer, that he knew of no such Privilege touching subpœnas, and would not allow it, unless the House did prove it had been allowed

Parliament dis-  
 solved before any  
 decision.

in the Court of Chancery ; upon that the House of Commons directed a search for precedents, and before there was any report of the committee the Parliament was dissolved.

So that this precedent really amounts to nothing. First, your Lordships see it was a question of practice ; it was a question of personal immunity ; it proceeded no further than a claim being made ; there was no judgment or final decision upon it ; the Parliament was dissolved before it came to a termination ; nothing was put upon the record, and no question can be supposed to have been decided contrary to the Privileges of the House of Commons.

Come we now to the case so much relied on, but which I think your Lordships will see, when properly considered, has no application,—the case of *Benyon v. Evelyn*.  
 Benyon v. Evelyn,  
 O. Bridg. 324 ; 16  
 C. 2, A.D. 1664.

This has been supposed by those who have superficially discussed the subject, to be an authority to show, that there is a general jurisdiction in the Courts of Law to examine and overrule what is done by authority of Parliament. My Lords, upon being examined, it will be found that no question arose in which either House of Parliament was interested. No claim of either House of Parliament ever came before the Court ; it was merely a statement on the part of the plaintiff, who was not a Member of Parliament, that there was a Privilege he wished to thrust upon an unwilling defendant, for the purpose of depriving him of the benefit of the Statute of Limitations, because he had been a Member of Parlia-



ment. The action was clearly barred by the Statute of Limitations, and suggesting the Privilege of Parliament was an ingenious expedient on the part of the plaintiff, by which he sought to defeat the plea. The Court was bound to give judgment for the defendant.

The action was in *indebitatus assumpsit* for goods sold and delivered on the 1st of April, 1657 ; plea *non assumpsit infra sex annos*. Replication, "that the defendant at the time of the promise, and till 30th January, 24 Charles I. (1649), was a Member of the House of Commons, on which day Parliament was dissolved by the death of the King" (that was when Charles I. suffered at Whitehall) ; "and that by the Privilege of Parliament every person being a Member thereof is and ought to be free from all actions, suits, and prosecutions, unless for treason, felony, or breach of the peace, so that it is not lawful to sue out any original Writ or Bill against a Member of Parliament from any Court of our Lord the King sitting in Parliament, and that from 30th January, 24 Charles I., to 29th May, 12 Charles II. (1660, the date of the Restoration), there was not any Court of Chancery of our Lord the King from which an original Writ could issue ; nor any other Court of Record of our Lord the King open, in which the plaintiff could have brought his action in that interval ; and that

the action was brought within six years from the 29th May, 12 Charles II. The rejoinder by the defendant was, that the cause of action, if any, accrued to the plaintiff on the 20th July, 21 Charles I. (1645), and from thence to the death of the late King, and from thence hitherto the Court of Chancery and other superior Courts at Westminster were open ; so that the plaintiff might have freely prosecuted his action with effect." There was

a sur-rejoinder by the plaintiff, "that the defendant was a Member of Parliament, till 30th January, 1649, so that the plaintiff could not sue out any original Writ or Bill against him ; and that from thence till the 29th May, 1660, there were no Courts of our Lord the King in which the plaintiff could have sued the defendant." Whereupon there was a

demurrer and a joinder in demurrer. Now your

In that case it was clear that the Statute of Limitations was a bar.

Lordships will see in a moment, that upon the record there really was no question for argument, for it was admitted that much more than six years had elapsed from the cause of action accruing until the suing out of the writ, which was the commencement of the action. The statute of the 21st James I. contains no exception with regard to Members of Parliament, or with regard to the suspension of the Courts of justice; and it was wholly unnecessary for the Court to consider the question, whether a Member of Parliament was privileged from being sued sitting the Parliament. The whole Court concurred in the doctrine that even if the Member had been so privileged, the statute would still have been a bar. Where, then, was the use of any parade of authorities on the question of Privilege? Where

Therefore the discussion as to Privilege unnecessary.

was the use of Lord Chief Justice Bridgman saying he had heard of some resolution of the House of Commons that was not put upon the record, of which he had no judicial notice, and a rumour of which only had reached him from a Parliament man? My Lords, if the question whether the action was maintainable depended upon the question of Privilege, it would have arisen only incidentally; it

At most the question arose only incidentally.

would only have arisen from the plaintiff contending that he could not bring his action sooner, because the defendant was privileged from being sued while Parliament sat. The action was not brought for anything done by the authority or command of either House of Parliament. But when your Lordships find it wholly unnecessary to entertain the question of Privilege at all, what weight is to be given to any *dicta* in the judgment of Sir Orlando Bridgman? The case as a decision does not weigh a feather. My Lords, the amount of these *dicta* has been greatly exaggerated; they will be found to apply only to the subject-matter before the Court, the question arising incidentally.

Sir Orlando Bridgman, a great lawyer, and I believe a respectable man, though expelled from the House of Commons, and bearing them no great good will, was speaking merely of the question arising incidentally before a

So treated by Ld. C. J. Bridgman in his judgment.

Court of Law. His Lordship's words are, "Matter of contract, and whether the suit was brought within the time prescribed by the Statute of Limitations, which is the principal, being determinable here, the Privilege of Parliament, coming in incidentally as part of the case, as a consequent must in this particular case be debated here." And he refers to Trewynnard's case, and Ryver's case, to which I have already directed your Lordships' attention. What he says, giving the fullest effect to it, merely amounts to this:—"As it appears the question arises incidentally, the Court must dispose of it;" which, for the sake of argument, I may readily admit.

Sir Orlando Bridgman, after alluding to Thorpe's case, in which the judges declined giving any opinion on a question of Privilege in Parliament, says,—“But out of Parliament, where upon an action of Common Law, a question concerning the Privilege of Parliament arises, nothing hath been more frequent than for the Judges of the Common Law to deliver their opinions concerning it, and consequently to give their judgments.”

Now, my Lords, I say, that applying this language to the case then before the Court, it is clear that the Lord Chief Justice was speaking of a question of Privilege arising incidentally, and Mr. Justice Bayley evidently so considered it; for when the passage I have just read was cited in the argument of *Burdett v. Abbot*, his Lordship observed, “They (the Judges) must know the extent of their own jurisdiction, and in what cases it is taken away. But it does not follow that the Common Law Courts are bound to take cognisance of the particular way in which the Privileges of Parliament are to be exercised in all instances. The cases alluded to are those where an action being depending in this or some other Court, it has been attempted to stop the proceeding upon the ground of an alleged breach of Privilege; it therefore became necessary for the Court to take notice of the extent of their own jurisdiction, and to see whether a sufficient foundation were laid for staying the action.”

Opinion of Bayley, J., on this subject, 14 East, p. 33.

C. J. Bridgman then proceeds to speak of a false rumour he

O. Bridg, 331.

had heard of a resolution of a Committee of Privileges—he says ; “ The next cause why I should have avoided the present debate about Privilege of Parliament is this, it was said at the bar, that it had been declared by the Committee of the House of Commons of Privileges, the last session, in a case of a Member of Parliament, that it was a breach of Privilege to sue out and file an original against a Member of Parliament, which is the point in question. I have inquired of some Parliament men of great note and learning, touching that resolution, who have denied to me that they know of any such, so that is to me as *res integra*. But if it be so as was alleged, I shall give all reverence, as becomes me, to all opinions and votes, as proceeding from so honourable a body. But I am under the conscience of an oath, to do equal law according to the best of my own judgment, whatsoever the authority of other opinions or resolutions may be.”

Now, there having been no such resolution of the Committee of the House of Commons as his Lordship alludes to, there seems to be but little necessity for his saying what he would have done if there had.—The only reason he gives for entering upon the question is the regard he had for his oath, which really could have no bearing either one way or the other on the point at issue. For if there had been a resolution of the House of Commons on the subject, and if that resolution were an authoritative declaration of the Law of Parliament, then his Lordship's oath would have bound him to be guided by it.

What are the authorities upon which Sir Orlando Bridgman relies ?

The 1st is thus mentioned ; “ 39 E. 3. 14. The Judges of Assize proceeded according to law, notwithstanding such a resolution and command to surcease.”—Nothing more is stated : None of the circumstances are set out. Upon referring however to the Year Book, it appears that in an Assize of *Novel Disseisin* the question was, whether or not the tenant was bastard ; and this fact was referred to the Bishop, who certified that the tenant “ was

Authorities cited  
by C. J. Bridgman  
examined.  
Y. B. 39 E. 3,  
A.D. 1365. cited  
O. Bridg. 331.

bastard, and the manner how, that J. took to wife K., that after a time she left her husband and dwelt with one F. S. which F. begot upon her (while she was in adultery) the tenant." Whereupon the tenant, who was dissatisfied with the certificate, "caused it to be suggested in Parliament how the Bishop had certified, which certificate was against the common law of England, and prayed for his remedy. And he had a writ to the Justices of Assize to surcease, that they should not go on any further; and notwithstanding this they took the Assize in right of the damages, and adjourned the parties to the Common Bench. And afterwards a writ came to them, to cause the record to be brought to the Council before the Bishop of L. The Bishop took the Assize in right of the damages, and adjourned the parties to the Common Bench. And afterwards a writ came to them to cause the record to be brought to the Council before the Bishop of L., the Bishop of Bath, and the Bishop of Ely, to try there, if the cause which the Bishop assigned to bastardize him would adjudge him by law [to be] bastard. And it was discussed among them, and they adjudged the certificate good for the cause [alleged]. And afterwards, because the Justices of Assize took the Assize in right of the damages contrary to the writ that came, the Chancellor reversed that judgment before the Council, where it was adjudged in the same course as the Bishop had certified, and they ordered back the record into the Bench. And there, because the Bishop had certified that the tenant was plainly bastard, it was agreed that the plaintiff should recover his seisin and his damages. But the parties took no regard of the reversal before the Council, because that was not a place where judgment could be reversed, &c."

Such, my Lords, is the language of the report of this case; and it is not easy to see how Sir Orlando Bridgman could understand it in the sense in which he brings it forward.

In the first place it does not appear that the writ to the justices to surcease was issued by the Parliament; neither Fitzherbert, Brooke nor Rolle, in their Abridgments so state it; the case, on the contrary, is cited by them to show that the Judges will consider

themselves bound by the Bishop's certificate on the subject of bastardy, without considering the reasons on which it is founded ; and they merely notice the fact incidentally that the tenant complained to the Parliament of the Bishop's certificate.

But even assuming that the writ to surcease was issued by the Parliament, still the case does not support the conclusions of the Lord Chief Justice ; for he cites the case to show that the judges "proceeded according to law, notwithstanding such a resolution ;" that is, a resolution that it was a breach of Privilege to sue a Member ; but it does not any how appear that the tenant in the assize was a Member of Parliament.

Sir Orlando Bridgman further relies upon a case of *Staunton v.*

*Staunton v. Staunton*; Fitz. Abr. 13; E. 3. Voucher, 119; Rot. Parl. 14 E. 3, 31; cited O. Bridg. 331. A. D. 1339.

*Staunton*, which, when analysed, no more supports his argument than the case I have just referred to. It was shortly this, there was a *formedon* in the Common Pleas against Baron and Feme, when the wife vouched her husband, and for cause, showed that her husband levied a fine to Thomas Cranthorn, who rendered to her and her husband and his heirs. The demandant counterpleaded, that Thomas Cranthorn had nothing of the gift of the husband. The question arose whether that averment could be made against the fine. The demandant sued to Council in Parliament—that is an expression, which, I presume, means, he took the opinions of the Lords upon it, and they held that the averment was reasonable.

Now this occurred in the time of Edward the Third, when it was not unusual for the Courts to consult Parliament in cases of difficulty, as in later times such cases were adjourned into the Exchequer Chamber before all the judges ; and in this case the Court of Common Pleas had taken the opinion of the Lords, whether this averment could be received against the fine. The Lords thought that the averment was reasonable. Then there was a *procedendo* to the Common Pleas, reciting this opinion, and commanding them to go on to judgment. The judges differed, and the cause was again brought into Parliament, and they again directed the Common Pleas

to proceed upon it. There was a Writ of Error, and the matter was again brought before the judges, notwithstanding those two resolutions of Parliament.—That is the whole of *Staunton v. Staunton*; and what does it amount to? It being a private cause, depending in one of the Courts of Westminster, it is brought forward to show that the resolution of either House of Parliament is not binding upon courts of law in matters of Privilege. Here is a suit depending in the Common Pleas; and, while it is pending, the opinion of the Parliament is irregularly taken upon it. It comes back to the Common Pleas; they do not consider that that opinion was right—an opinion given before the record was removed; and the Court of Common Pleas, disregarding that, gave judgment against the opinion that had been irregularly given by the Parliament in a *quasi* judicial capacity; and this is supposed to show, that in matters of Privilege, of which this does not savour in the slightest degree, the Houses of Parliament are subordinate to the Courts of Common Law.

These are the only cases upon which Sir Orlando Bridgman relied. I have examined them, and they do not in the slightest degree affect the position that the courts of law have no jurisdiction over what is done by the authority of either House of Parliament in the exercise of Privilege.

My Lords, I now come to Fitzharris's case, which occurred in the thirty-third year of Charles II., after the dissolution of the Oxford Parliament. “Edward Fitzharris, having been impeached for high treason, a question arose, whether the Commons could impeach a commoner for high treason; the Lords resolved that he should be proceeded with according to the course of the Common Law, and not by way of impeachment; and the Commons (on the 26th March 1681) afterwards resolved that this resolution was a denial of justice and a violation of the constitution of Parliament. In short, there was a dispute between the two Houses, whether the Lords should proceed with the impeachment, or whether Fitzharris should

Fitzharris's case.  
8 How. St. Tr.  
223. 33 Charles  
2, A. D. 1681.

Impeached by  
Commons for  
High Treason.  
Lords resolved he  
should be tried at  
law.

be tried at Common Law. The Parliament at Oxford was dissolved two days after the resolution by the House of Commons ; and after the dissolution, as is well known, the King reigned without a Parliament until his death. Fitzharris's trial proceeded on the 27th of April 1681, and he was indicted for treason in the King's Bench in Middlesex. The prisoner then put in a plea in abatement, that an impeachment was pending against him for the same cause, and therefore he ought not to be tried. But, my Lords, that plea was simply a plea, that an impeachment was pending against him. The resolution of the House of Commons was not stated, and no question of Privilege was raised on the record. The plea was merely, that he had been impeached by the House of Commons, and although the trial came on after the dissolution of Parliament, it was supposed that the impeachment had not abated. My Lords, the plea was overruled ; Fitzharris was tried, found guilty, and executed. But, my Lords, the judgment proceeded upon the ground that although he had once been impeached by the House of Commons, yet, after the dissolution of the Parliament, the House of Commons not subsisting, his having been so impeached was no bar to his being tried for treason at the common law.

How does that show that Courts of Common Law have jurisdiction over matters of Privilege, and can award damages for that which either House of Parliament has done? There was no judgment here that the impeachment was illegal ; on the contrary, the

Chief Justice says, " We have nothing to do here,

whether the Commons' House at this day can impeach for treason any Commoner in the House of Lords ; we have nothing to do with this, what the Lords' jurisdiction is, nor with this point, whether an impeachment in the Lords' House (when the Lords are possessed fully of the impeachment) does bar the bringing any suit, or hinder the proceedings in an inferior Court. Fitzharris had been impeached, and the Parliament was dissolved, and it was clearly held that that impeachment, which was at an end, was no

Parliament dissolved. Trial proceeded.

p. 251.

8 How. Sta. Tri. He pleaded impeachment pending. Overruled. No question of Privilege.

p. 325.



bar to the prosecution for treason. The Lord Chief Justice afterwards says, “ Mr. Fitzharris, you have been ar-  
 p. 396.

raigned here for high treason, and it is for endeavouring and compassing the King's death, and other treasons specially mentioned in this indictment; you have pleaded here to the jurisdiction of this Court, that there was an impeachment against you by the Commons of England in Parliament, before the Lords for the crime of high treason; and you do say that that impeachment is yet in force; and you do say, by way of averment, that this treason, whereof you are now indicted, and the treason whereof you were impeached by the Commons of England, before the Lords, are one and the same treason; and upon this the Attorney-general for the King hath demurred, and you have joined in demurrer, and we have heard the arguments of your counsel whom we assigned to argue it for you; we have heard them at large, and have considered your case among ourselves, and upon full consideration and deliberation concerning your case, and all that hath been said by your counsel, and upon conference that we have had with some other of the Judges, we are, three of us, of opinion that your plea is not sufficient to bar this Court of its jurisdiction. My brother Jones, my brother Raymond, and myself, are of opinion that your plea is insufficient, my brother Dolben not being resolved, but doubting concerning it, and therefore the Court does order and award that you shall answer over to this treason.” After giving it its fullest effect what is the judgment?—That there having been an impeachment by the Parliament, and that Parliament having been dissolved, such impeachment is no bar to an indictment at Common Law for the same offence.

Mr. Justice *Patteson*.—There being no Parliament at all at the time?

Mr. *Attorney-general*.—The Oxford Parliament was dissolved, my Lord.

Mr. Justice *Patteson*.—And no other summoned?

Mr. *Attorney-general*.—No, no other during the King's life. The House of Commons had come to the resolution, before the dissolu-

tion, that the impeachment ought to proceed, and not the trial ; but that resolution was not brought before the Court in the plea of Fitzharris, if it would have been of any avail. All he did in his plea was to set out the impeachment in the Parliament which had ceased to exist.

According to the doctrine established in Warren Hastings' case, the dissolution of Parliament does not abate a pending impeachment ; but that was considered a very doubtful question, and at all events it was impossible, there being no Parliament, that the prosecution before the Lords should proceed, and there would have been a failure of justice unless the prisoner might have been tried on the indictment at Common Law.

Then comes *R. v. Knollys*, or Lord Banbury's case. An indictment

*Knollys', or Lord Banbury's case,*  
12 How. Sta. Tri.  
1167.

Salk. 509,  
1 Ld. Raym. 10,  
Carth. 297,  
4 & 5 W. & M.  
A. D. 1692-3.

Plea to indictment  
that defendant  
was a Peer.

Replication that  
he had petitioned  
the Lords to be  
tried as a Peer,  
and they had dis-  
allowed his  
Peerage.

Overruled.

The Lords have  
no jurisdiction to  
decide such a  
question, unless  
upon reference by  
Crown.

had been found at Hicks's Hall against Charles Knollys for the murder of Philip Lawson, and removed into the King's Bench ; there was a plea in abatement by the defendant that he was Earl of Banbury, being descended from William Knollys, first Earl ; the plea was clearly good : then comes the Replication, " that the defendant had petitioned the Lords to be tried on this indictment by his Peers, and they disallowed his Peerage, and dismissed the petition ;" this Replication was clearly bad ; there was a demurrer, and the Court held that the Replication was bad ; why ? Because it showed that this proceeding by the House of Lords was *coram non judice*. The Lords had no jurisdiction to inquire into such a matter upon a simple petition by an individual who claimed the Peerage. Their Lordships have no jurisdiction upon questions of Peerage,

unless upon a reference by the Crown.

The Crown may decide, and sometimes does decide, questions of Peerage upon the advice of its law officers. Upon the advice of Sir Samuel Shepherd, when Attorney-general, there was a writ issued to the person who claimed to be the Earl of Huntingdon, though

that Peerage had been dormant many ages. Since I have had the honour to fill the office of Attorney-general such cases have been referred to me for my advice. The House of Lords has no jurisdiction on this subject except when a case is referred to them by the Crown. In the case of Knollys so indicted, there had been no reference to the House of Lords by the Crown. The Replication merely stated, that upon the petition from Knollys to the House of Lords, they had decided that the claim could not be supported. That Replication was therefore most properly overruled by the Court of King's Bench; but the decision of the Lords was merely relied upon as a decision upon a matter of fact of a Court of competent jurisdiction;—and the Replication was clearly bad on the face of it, the Lords having adjudged without jurisdiction.

It was after that case that Lord Holt, being summoned before the House of Lords, very magnanimously refused to give any reasons in an irregular manner for the judgment he had pronounced. He was not charged with oppression or corruption, but merely with an erroneous judgment, and he most properly declared that if there was a Writ of Error brought, and the reasons of the judgment required from him as an Assistant of the Lords with the Judges of the land, he should be ready to render those reasons.

Thus in Knollys' case there was no question raised of Parliamentary Privilege. The fact in dispute was whether he was Earl of Banbury,—whether the prisoner was the legitimate descendant of the first grantee of the earldom?

My Lords, the next case that is supposed to give a colour to the doctrine my Learned Friend contends for is the well-known case of *Ashby v. White*, which it is not necessary for me to dwell upon at any length. The question and the only question there (and it was no question of Parliamentary Privilege), was, whether an action could be maintained by an elector of a borough against a returning officer for having maliciously rejected his vote,—a question in which the House of Commons really has no interest, and which, as Lord

*Ashby v. White*,  
2 *Ld. Raym.* 938,  
*Holt*, 524,  
6 *Mod.* 45,  
2 *Anne*, A. D.  
1703.

Action by Elector  
against returning-  
officer for reject-  
ing his vote.

Plea, not guilty.

Motion in arrest  
of judgment.

Action held maintainable.

Holt truly says, depends upon the Common Law, and upon the Statute Law, and not upon Parliamentary Law. The Judges were divided as to whether the action could be maintained. The question arose upon a motion in arrest of judgment; Powell, Powys, and Gould, Justices, were for arresting the judgment, and Holt, Chief Justice, was of the contrary opinion. The judgment was arrested: but upon a Writ of Error in the House of Lords the case caused a good deal of political feeling, and was made a party question. However, I am not going to impugn the decision; it is not my interest nor my inclination to do so. There were fifty Lords for reversing, and sixteen for affirming. Trevor and Price were of opinion with the three Judges of the King's Bench, making five against the action. Ward, Chief Baron, and Bury, and Smith, Barons, were of opinion with Holt, making four only in support of it,—so that though, looking to the Lords, there was a majority of fifty to sixteen for reversing, looking to the Judges there was a majority of five to four for affirming. Tracey doubted; Neville and Blencowe were absent.

This decision condemned by Lord Mansfield in *Milward v. Serjeant*, cited 14 East, 59 n.

No resolution of House of Commons brought judicially before the Court, and this no instance of Privilege claimed in Parliament, being overruled by Court of Law.

It is curious that this decision, though it has been generally approved of, was condemned by Lord Mansfield in *Milward v. Serjeant*, where he said he had advised petitions to the House of Commons for leave to bring such actions.

Now, my Lords, I must earnestly implore you to bear in mind, that in *Ashby v. White*, whatever might be the opinion of the House of Commons upon the action being maintainable, and whether it was a breach of Privilege or not, there was no resolution of the House of Commons upon the subject ever judicially brought before this Court, or before the Court of Error. The record merely showed a declaration, a plea of not guilty, with a verdict for the plaintiff, and a motion in arrest of judgment. It cannot be contended that any resolution of the House of Commons was thereby overruled, or that any act or proceeding of the House of Commons was thereby questioned. *Ashby*

*v. White*, therefore, as a judicial decision, did not profess to dispose of any question of Privilege, and is no authority for the purpose for which it is cited.

Other actions followed, in which it was held that a returning officer may be sued if he wilfully and maliciously rejects the vote of an elector. In addition to the case of *Milward v. Serjeant*, to which I referred your Lordships, may be added *Drewe v. Coulton*, a case before Mr. Justice Wilson, at Launceston, in 1787; and *Fox v. Corbett*, an action brought by the celebrated Charles James Fox, against the High Bailiff of Westminster, for not returning the writ, and proceeding with a scrutiny after the writ was returnable. But in these cases there was no collision between the House of Commons and a Court of Law, nor did any question of Privilege arise in any one of them.

There is a case which is referred to for *dicta*, but not for anything decided in it,—the case of the Duchess of Somerset *v. the Earl of Manchester*. It arose before the delegates, touching the validity of the will of the Earl of Essex; the defendant, the Earl of Manchester, wrote a letter to the delegates, and demanded forty days' privilege before the Session of Parliament to put off this sentence, and the delegates thereupon came to certain Resolutions. My Lords, I must say, that I think the delegates would have done much better if they had thrown the letter into the fire. It was a very impertinent proceeding thus to write a letter to a Court of Justice, and they would have been fully justified in taking no notice of it whatever, or treating it as a contempt. However, they were very much offended, and did take notice of it, and in their indignation came to certain hasty, ill-considered and extra-judicial Resolutions. “First, that they ought not to take notice of any Peer's or Member's demand of Privilege upon any letter or information, but only when claimed by Writ of Privilege under the Great Seal, directed to them according to law and

*Milward v. Serjeant*, 14 East, 59, A. D. 1785.

*Drewe v. Coulton*, 1 East, 563, A. D. 1787.

*Fox v. Corbett*, cited 14 East, 42, A. D. 1784.

Duchess of Somerset *v. Earl of Manchester*, 4 Pryn- Reg. 1214, 16 C. 2. A. D. 1664. Before delegates. Defendant wrote to claim Privilege.

Resolutions of delegates.

ancient custom of Parliament.” They might have contented themselves with that Resolution, but they go on : “ Secondly, that when any question arises concerning Privilege of Parliament, and comes legally and judicially before the King’s Justices upon any case or trial in his Majesty’s Courts, they are the proper Judges to allow or disallow it according to law, as in the cases of Walsh, Cosens, and others forecited ; for being Judges of the principal case, they must by consequence be Judges of all consequences that attend it. Thirdly, That Privilege of Parliament was not to be allowed in point of law to any Peer or other Member sued only in another’s right as an executor, &c. the Privilege being merely personal for him and his necessary servants, &c. Fourthly, that the Earl had no Privilege for forty days before the Session of Parliament. Fifthly that Judges were not bound to proceed in Courts of Justice according to the votes of either House in cases of Privilege, but according to the known laws and customs of the Realm, their oaths and trusts. Sixthly. That they being only met to give judgment in that case formerly heard, wherein the Earl’s personal attendance was not necessary or required, they might proceed to pass sentence therein without breach of Privilege, which they thereupon then did accordingly, reversing the Earl’s Will, and granting administration to the Duchess, his sister.”

Now, your Lordships see that judicially there is nothing decided of the smallest importance respecting Privilege, for the only point that could come before the delegates was, whether the Earl of Manchester, having Privilege, was to have forty days, and they say he was not so entitled. Their first resolution was wrong, if it meant that a Writ of Privilege was necessary in all cases ; they said that nothing was to be done without a Writ of Privilege ; that shows that those Resolutions were come to in a very hurried and inconsiderate manner. The second Resolution is evidently confined to cases where the question of Privilege arises incidentally, and the cases cited are *Ryvers v. Cosens*, and *Donne v. Walsh*. Then the determination is, that the Earl had not the Privilege for forty days before the Session of Parliament. That they might have resolved, and

with that they might have been contented. Then they say that Resolutions of either House are not binding. My Lords, there was no Resolution of either House brought before them; there was simply the letter of the Earl of Manchester, stating he was not liable to appear before them till the expiration of the forty days; it was a most gratuitous declaration on their part, and entitled to as little respect as the epistle of the Earl of Manchester.

Another case that may be referred to upon this subject is the Duchess of Kingston's. That was a trial of the Duchess of Kingston before the Lord High Steward for bigamy, for having married the Duke of Kingston, her former husband, Mr. Hervey, afterwards the Earl of Bristol, being still alive; she relied upon the sentence of the Consistory Court of the Bishop of London by which it was decreed and declared that she was free from all matrimonial contracts or espousals with the said Mr. Hervey. Mr. Wallace was heard in support of the defence on the sentence in the Ecclesiastical Court, before the case was opened on the part of the prosecution. The proceedings were read and Mr. Wallace argued that the sentence was conclusive; and Mr. Mansfield, Dr. Calvert, and Dr. Wynne were heard on the same side. Then the Attorney-general, the Solicitor-general, Mr. Deering and Dr. Harris were heard on two points for the prosecution: 1st. That the sentence was not conclusive; and 2nd. That it was obtained by collusion and fraud. Mr. Wallace and Dr. Calvert were heard in reply, and two questions were put to the Judges; 1st. Whether the sentence was conclusive? and 2nd. Whether it might be avoided by showing it had been obtained by fraud and collusion? The opinion of the Judges was, that the sentence being in a suit of jactitation of marriage, and that suit being fraudulent, it was no defence to the Duchess of Kingston upon this indictment for bigamy, and the trial therefore proceeded.

My Lords, I need not trouble you with a more minute statement

Duchess of Kingston's case, 20  
How. Sta. Tri.  
355, 16 G. 3,  
A.D. 1776.  
Trial for bigamy.

Sentence of Ecclesiastical Court relied on for defence.

Held it might be impeached on ground of fraud.  
(p. 377.)  
(p. 537.)

(p. 543, 4, 5).

of that case, because there no one thought of impugning those cases I have cited to you, in which it was held, that a just and legitimate judgment of the Ecclesiastical Court is binding where the same question incidentally arises. The Lords merely considered that this sentence was fraudulent and collusive, and that it afforded no defence to the party accused, she having been a party to the fraud.

I may therefore come to the case of Mr. Long Wellesley, upon which my Learned Friend relies, and for which he has very much lauded the noble and Learned Lord, who then held the Great Seal. What does the case prove? Mr. Long Wellesley was guilty of contempt in keeping possession of the person of a ward of Chancery, contrary to the authority of the Lord Chancellor,—and contumaciously refusing to deliver up the ward, he was committed for a contempt of Court. He claimed a right to be released on the ground of Privilege. A Committee of the House of Commons, appointed to consider the subject, decided against the claim. The Report of the Committee was adopted by the House, and his claim to be discharged was most properly disallowed by the Lord Chancellor. Now, what does that amount to? Merely to this, that there may be a claim of Privilege which the Court may disallow, and is bound to disallow. Why, my Lords, if any debtor being taken upon a *ca. sa.* were to apply to this Court and say, that being a third cousin of a Member of Parliament, he was privileged from being taken upon a *ca. sa.*, your Lordships might very properly, for aught I know to the contrary, determine that no such Privilege exists,—he merely claiming it, and bringing nothing at all in support of such a claim. Mr. Long Wellesley simply asserted, that being a Member of the House of Commons he was not liable to be taken upon an attachment by the Lord Chancellor. The Lord Chancellor held he was liable—after the House of Commons had decided the same thing. The decision of the Court, instead of being against the resolution of the House of Commons, was in exact conformity with it.

Long Wellesley's case, 2 Russ. & Mylne, 639.

4 Ld. Brougham's Speeches, 358, A.D. 1831.

Committed for contempt of Court of Chancery.

Claimed Privilege. Disallowed by House of Commons, and by Lord Chancellor, in conformity with decision of House of Commons.



There are certain expressions to be found in his Lordship's judgment, which I think might well have been spared after the decision of the Committee of Privileges and of the House ; and I cannot attach much importance to the declaration of the noble and Learned Lord as to what his conduct would have been if that decision had been different. My Lords, I have the most sincere respect, and I may say, regard for the noble and Learned Lord who pronounced that judgment : but taking it in conjunction with the preface to it, with which he, mixing as an eager partizan in this controversy, has recently favoured the world, it does lower very much the value to be given to any expression of his respecting Privilege. Some of the inaccuracies into which he has fallen, I will at this late hour refer to very shortly.

Lord Brougham's judgment.

His opinion on Privilege.

Inaccuracies.

He supposes it was an illegal claim that servants of Members of Parliament were to be free from arrest ; it was not an illegal claim, it was a Privilege recognised by the law of the land till taken away by an Act to which the Commons assented in the 10th year of Geo. III.

4 Ld. Brougham's Speeches, 342.

He supposes that it was claimed by Members of Parliament, that their houses were not to be entered under legal process, and that they had the Privilege of sanctuary like the Royal Palaces. I beg to say no such claim is to be found at any period of the history of Parliament. What was claimed was this, that what a Member necessarily brought along with him, and used while he was attending Parliament, was to be privileged ;—and from the nature of the times it was necessary that the privilege should so far exist. Now-a-days a Member may travel to London from the provinces by a post-chaise, or by a stage-coach, or by a railway ;—but in former times he was obliged to ride the whole journey on the horse which he mounted at his mansion-house door in the country, and if the horse was taken away from him he could not be in his place in Parliament at the return of the Writ. Do not let us suppose that our ancestors were so outrageously absurd as would be represented when they

claimed Privilege for a horse, or that which was indispensably necessary for their doing their duty while the House sat. It never was pretended, as far as I know, that the house of a Member was like a Royal Palace, and had the Privilege of sanctuary.

My Lords, it is supposed by the Noble and Learned Lord, that the claims as to servants being privileged, &c., were silently abandoned; they were not silently abandoned, they were taken away by Acts of Parliament to be found in the Statute Book.

I will say no more as to the parallel between Privilege and robbing and murdering on the highway, or as to the Privilege of the House of Commons being like that of the members of a profession; but I must point out another inaccuracy of the Noble and Learned Lord. He supposes, that the Committee of the House of Commons to inquire into the printing and publication of Parliamentary papers, was appointed after this action was brought. The Committee, to which reference is made, arose out of another action, and had no view to this action, and that Committee had made its report before this action was commenced or known to be in contemplation. Again, his Lordship supposes there is a claim by the House of Commons of making laws, which has never been set up. Finally, it is alleged by the

(Page 344.)  
(Page 345.)  
(Page 350.) Noble and Learned Lord, that the Commons were guilty of a gross inconsistency, after the resolutions to which they had come, in appearing and pleading to this action. If this was a fit subject for a Peer of Parliament to discuss pending the suit, I think I have shown that these resolutions were entirely consistent with the procedure which the House subsequently adopted.

Now, my Lords, I have only to bring before your notice, which I will do very briefly, the case of Mr. Lechmere Charlton, which is the last case which has occurred upon this subject.

Lord Chief Justice *Denman*.—We wish to consult your convenience. You have been fully and favourably heard, and if you are likely to conclude to-day, we will sit a little longer.

*Mr. Attorney-general.*—I am just concluding this head of my argument, and then I shall pray that I may have a respite till to-morrow, when, if I am not stopped as having already entitled myself to your judgment, I shall have much information to lay before you respecting the existence of the Privilege.

Lechmere Charl-  
ton's case,  
2 Mylne & Craig,  
316. A. D. 1836.  
Same point as last  
case.

My Lords, in Lechmere Charlton's case, as in Long Wellesley's case, there was no decision at all at variance with the exclusive jurisdiction of the Houses of Parliament over questions of Privilege. Mr. Lechmere Charlton, Member for Ludlow, being committed for a contempt of the Court of Chancery, presented a Petition to the House of Commons, claiming to be released, on the ground of Privilege. It was referred to the Committee of Privileges, from whom there was a report that he was not entitled to Privilege. This case came before Lord Cottenham, the present Chancellor, and he certainly is more cautious a good deal in the language he uses than his immediate predecessor; he does not say what he would have done if the resolution of the House of Commons had been different, but he seems to consider the proper mode of settling the law to be by a reference to the Committee of Privileges, and not by a decision of a Court of Justice. The present Lord Chancellor says, "Mr. Charlton, as a Member of the House of Commons, and as a Barrister, must very well have known that no longer ago than the year 1831, a case occurred which involved a question precisely similar to the present; it was matter of discussion in this Court, and of inquiry in the House of Commons, and it led to the same result as has followed the investigation in this case, namely, the resolution of a Committee of Privileges that for contempts of this Court the House of Commons most properly do not consider a Member of their House as privileged; by contempt of this Court, I mean that species of contempt of which the party was guilty in the case of 1831, and of which Mr. Charlton has been adjudged guilty in this case. Of the law of Parliament and the law of this Court, therefore, Mr. Charlton, educated as he must have been, and filling the situation in which he was placed, could not possibly have been

(p. 354.)

ignorant." "Then," says Lord Cottenham, "he adopts the course of ascertaining what a Committee of Privileges would do in his favour, and that course has ended in the way stated in his petition." Lord Cottenham proceeds to say that, under these circumstances, Privilege does not apply, and he orders him to be remanded.

Now, my Lords, as far as the authority of that noble and learned Judge goes, it seems to intimate that the Houses of Parliament would properly judge of their Privileges, and he, instead of disputing, or scorning, or spurning at the decision of the Committee of Privileges to which this question is referred, speaks of it with great deference and respect, and acts upon it.

My Lords, this is the latest case I am aware of in which any such question has arisen, and I have now upon the first and second branches of my argument travelled, as far as I know, through every case that could be cited against me. Your Lordships are, no doubt, acquainted with them all, but I wished to bring them fully and fairly before you. I have kept back no case and no *dictum* that could possibly be relied upon by the other side, as far as my researches extend. What is the result? Is there any authority to show that the law of Parliament is not separate from the Common law? Is there any to contradict what is laid down in the reign of Richard II., and repeated by all the Judges from Thorpe's case down to the present day, that it is a separate branch, with which the Common Law Judges are not supposed to be conversant, and of which they ought not to take cognizance against the declared opinion of Parliament? Is there any thing to show that the Houses of Parliament are not Courts superior to the Courts of Common Law, and that in such superior Courts the administration of this branch of the law is constitutionally vested? Is there any one case or *dictum* to show, that where the question of Privilege arises directly, the Courts of Common Law have jurisdiction over it; or that where the question of Privilege arises incidentally, and the adjudication of the Court of exclusive jurisdiction is judicially brought before the notice of the Court of incidental jurisdiction, this adjudication is not binding? Is

Summary of first  
and second  
branches of argu-  
ment.

there any thing in the slightest degree to impugn the authorities upon which I rely, which are numerous and uniform, and which, with one voice, declare, that on questions of Privilege directly arising, Courts of Law have no jurisdiction, and that for acts done by the authority of Parliament no action can be maintained.

It still remains for me, under protest, to argue before your Lordships, that if you could examine into the existence of this Privilege,—if you can conceive yourselves in the situation of Members of the House of Commons discussing the question in their chamber,—if you consider yourselves sitting here competent to weigh arguments of expediency and reasons of state,—if in deciding this demurrer you are to look into the Journals and Votes of the House of Commons, and inquire into usages of which there is no written record,—you will find that this Privilege has long existed; that it is essentially necessary to the exercise of the functions of the House of Commons, and that any curtailment of it would be injurious to the rights and liberties of the people.

Lord Chief Justice *Denman*.—To-morrow we will proceed with the case. Adjourned.

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### THIRD DAY.

THURSDAY, 25TH APRIL, 1839.

Lord *Brougham*.—Mr. Attorney, I find I was quite wrong yesterday; *Burdett v. Colman* was argued in the House of Lords; but Mr. Courtenay argued it, and not I; he was my junior.

Mr. *Attorney General*.—Before I proceed with my argument I am desirous to set myself right with regard to Lord Chief Justice Kelynge; because it would be most painful to me to be supposed to have brought any charge against a Chief Justice of this Court which I could not substantiate. From the sixth volume of the State Trials, it appears that Chief Justice Kelynge,

C. J. Kelynge's  
dictum respecting  
Magna Charta.  
Wagstaff's case,  
Hardr. 409.  
6 How. St. Tri.  
993, 17 C. 2, A.D.  
665,

when on the Western Circuit, fined Wagstaff and others of the Jury 100 marks a piece, "because, though evidence was given that persons had assembled at conventicles and had Bibles with them, the Jury would not find them guilty of keeping a conventicle upon the late Act of the 16th Charles II., and the Jury were committed till they paid their fines."

Again, on a trial before him of Henry Hood, for the murder of John Newen, he fined the Jury in large sums, because they found a verdict of manslaughter, instead of a verdict of murder, the Chief Justice wishing that the prisoner should be hanged. A complaint being made upon this subject to the House of Commons, it appears by the Journals now lying before me, that "on the 6th of October, 1667, the House being informed that there have been some innovations of late in trials of men for their lives and deaths, and in some particular cases restraints have been put upon Juries in the inquiries, this matter is referred to a Committee."

Godwier's case,  
Kelynge's Rep.  
50. 6 How. Sta.  
Tri. 993. 18 C.  
2, A.D. 1666.  
Com. Journ. 6  
Oct. 1667, 4 Hata.  
113.

Lord C. J. *Denman*.—That is the case probably that Sir Robert Atkins referred to.

Mr. *Attorney-general*.—It may be.

Lord C. J. *Denman*.—It is stated in the 14th State Trials, that Sir Robert Atkins argued the case of the King *v.* Williams; and there is a long history given of it upon the respectable authority of Mr. Charles Wynn. All the circumstances are mentioned.

Mr. *Attorney-general*.—Which are a mere fable; the argument was prepared but never spoken.

Lord C. J. *Denman*.—I think it must be so. Looking at the report in Comberbach and Shower it is clear that that could not have taken place, and that he must have prepared the argument only.

Mr. *Attorney-general*.—Sir Robert Atkins was then a Judge in retirement, and he merely wrote the argument as an exercise.

My Lord, this and other charges being preferred against Chief Justice Kelynge, and particularly that he had spoken with great irreverence from the Bench of Magna Charta, there was a Com-

mittee appointed to inquire into those charges. The Committee did inquire, and made a report, and then upon that report, December the 11th, 1667, "The House resumed the hearing of the rest of the Report, touching the matter of restraints upon Juries, and that upon the examination of divers other witnesses in several clauses of restraints put upon Juries by the Lord Chief Justice Kelynge; whereupon the Committee made their resolutions, which are as followeth :—

"First, that the proceedings of the Lord Chief Justice, in the cases now reported, are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government.

"Second, that in the place of judicature the Lord Chief Justice hath undervalued, villified and condemned Magna Charta, the great preserver of our lives, freedom and property.

"Thirdly, that he be brought to trial, in order to condign punishment, in such manner as the House shall judge most fit and requisite.

"December 13, 1667. Resolved, &c., that the precedents and practice of fining or imprisoning Jurors for verdicts is illegal."

Then there follows in the same page of the State Trials an account of the conduct of the Recorder of London, who had presided upon the trial of Penn and Mead, of which this is an extract :—

"Nor can we think so ignobly of the Parliament as that they should do less than call these persons to account who failed not to do it to one less guilty and of more repute (to wit), Judge Kelynge; for if his behaviour gave just ground of jealousy that he intended an innovation, and the introducing an arbitrary government, this Recorder much more. Did Chief Justice Kelynge say Magna Charta was Magna ———? so did this Recorder too. And did Justice Kelynge fine and imprison Juries contrary to law? so did

this Recorder also. In short, there is no difference, unless it be that the one was questioned and the other deserves it." So much for Chief Justice Kelynge!

I am well aware, that in Lord Clarendon's History, he mentions that the same irreverent expression with regard to Magna Charta was used by Cromwell; but in the very page in which this anecdote is related, the noble historian adds, "that in all other matters which did not call in question his jurisdiction, he seemed to have great reverence for the law."

My Lords, I now resume my argument according to the method I had proposed,—and, respectfully denying the power of this Court to inquire into Privilege, and protesting against such an assumption of jurisdiction, I proceed to argue the question as a Member of Parliament might do in the House of Commons, if it arose there, and to show that the House of Commons may lawfully order the publication of any Report or Paper laid before the House, and may for public information print any of their proceedings the publication of which they may judge necessary to the performance of their functions and conducive to the public good, although what is so published be of a criminatory nature, and if published without authority might be the subject of action or indictment. If the House has this power, of course no action can be maintained for what is done in the exercise of it.

That the House of Commons may lawfully order the publication of Reports and Papers though criminatory.

Admitted that they may lawfully print even criminatory matter for the use of Members.

of the difference between us. I understand it to be conceded that such Reports and Papers though defamatory, may be lawfully printed for the use of the Members of the House, and may be distributed among them; but that the delivery of a copy to any one not a Member of the House is said to be illegal. If the Court can inquire into the existence of the Privilege, and the Privilege of printing and circulation is confined to the use of the Members, I must acknowledge that the present action may be maintained. Assuming that the circulation must be confined among the Members of the House, and



that the Court can inquire what is the extent of the Privilege, there would be no defence to this action. Upon the record there is a publication admitted to a person not alleged to be a Member. The circumstances of the publication are not at all stated in the declaration

It does not appear whether the publication in this case was for sale ; but that circumstance is immaterial.

nor in the plea ; it is not alleged in the declaration, nor does it appear by the plea that this was a case of sale,—whether there was any money received for the copy, or it was delivered gratuitously. There

might well have been a publication of this paper to a person who was not a Member of the House of Commons, although it was not sold, and no price was paid for it. But the question of sale must be wholly immaterial. Whether the delivery was gratuitous, or whether it was in consideration of the full price which would be required for the printing of this publication, or a portion of it, can weigh nothing in your decision. The action lies for the publication if unauthorized, whether there was a price or not ; and if the action would not lie were the distribution gratuitous, it cannot lie, a price being paid ; therefore this circumstance of sale, about which so much has been said, is a matter in the consideration of every lawyer utterly indifferent.

Before I proceed, let me consider the importance to the plaintiff

Contested right to publish of small importance to individuals, of greatest importance to the public.

of this great controversy, about which so much has been said by those who deny the power which the House of Commons claims. This power is of the last importance to the House of Commons ; it is of the last importance to the public ; but I say to the

individual who complains,—to the individual whose name may be mentioned in the publication, the existence of the power beyond the admitted limit is of no importance at all. Those who have inflamed their imaginations with the notion that they are the guardians of reputation, will find that they are bringing into collision different powers in the State which have long worked harmoniously together to carry a point, which, when understood, will be pronounced to be utterly worthless,—and the thanks they receive may ultimately be only from those who wish to bring pettifogging ac-

tions, and to convert a damaged character into a source of pecuniary gain. “*Rixatur de laná caprind.*”

Why, my Lords, it being conceded that of this or any such criminatory publication 658 copies may be printed and distributed among the representatives of the people, and I presume that the other House may reprint it for the use of all Peers who have a seat in Parliament, and that it may also be communicated to the Throne, what is the situation of the person defamed? The Sovereign, the Members of the House of Lords and the Members of the House of Commons, the leaders of the contending parties in the State, and all their followers in Parliament, it is allowed, may read this charge without a legal grievance or legal remedy. If they were strictly to abstain from mentioning the criminatory matter to others, the misfortune of the party cannot be much aggravated who has forfeited the good opinion of those whose good opinion it is so important for fame, fortune, and friendship, to possess. But will they keep it to themselves? Will this slander, if it be slander, not have a wider circulation? It might be indictable for a Member of Parliament to show his copy to any person who is not a Member of Parliament, but he may state in conversation what he has read, unless the words are actionable as verbal defamation; he may mention to all mankind what is to be read only by a Member of Parliament. The story necessarily gains publicity; but the person who is the object of it is deprived of all means of vindication. He observes the averted countenances of his patrons, his friends, and acquaintance, and he may be wholly ignorant of the cause to which this alienation is to be ascribed. If he hears a rumour of a Parliamentary Report in which he has been assailed, and sends for a copy, it must be forbidden to him. The party selling or delivering a copy to him would be liable to an action—would be liable to an indictment. The individual, therefore, has no means of vindicating his character; he knows not who is his accuser; he cannot petition either House of Parliament that he may be heard in his defence, and he thus may become the victim of

Effect of confining  
circulation to  
Members.

An accused party  
would have no re-  
dress.

an accusation which he has the means, but not the opportunity, of refuting. All this evil arises to the individual within the limits to which it is admitted that the publication may lawfully be extended. But would it not be much better that he should be allowed to procure a copy; that he may know the circumstances of the charge against him; that he may have an opportunity of meeting and refuting it; and that he may resort to the various means which belong to any person who is improperly accused, of justifying his conduct, and vindicating his innocence?

My Lords, although when he has got the copy to which he would be entitled if there is to be a general circulation, he may not be able to prefer his indictment, or to bring his action against the officers of the House of Commons; are there no other means by which a false charge may be repelled,—by which wounded honour may be healed? The law of England has left parties against whom the most serious charges may be brought without any means of vindication by bringing an action, or preferring an indictment. A man may be called a liar, a coward, and a slanderer; a woman may have her chastity assailed in the most opprobrious terms,—and no action can be maintained—no indictment can be preferred. My Lords, it appears to me that to individuals, this liberty of general publication residing in the two Houses of Parliament is a matter of great indifference,—that it will not endanger their reputation in any degree, but on the contrary, that it gives them an opportunity of vindication which they would not otherwise possess. According to the rule that is contended for on the other side, each House of Parliament would be erected into a secret tribunal, with a power of ruining reputation, and without giving the party who is attacked an opportunity to justify himself to the world. But, my Lords, the matter is of infinite importance to the public; because if the circulation is to be confined merely to Members of Parliament, merely to the Peers and the representatives of the people, then the community, the constituent body, are entirely cut off from that information which it is most essential that they should obtain.

Publication gives parties opportunity of vindication, though not by action.

My Lords, I should like to know from my Learned Friend how this line is to be preserved,—of allowing the distribution merely to Members of Parliament,—and there stopping. How many copies are to be printed? 658 I presume. And no more, he will say. Well, but are none to be printed for the other House of Parliament—for the Members of a future House of Commons? What is to be done upon a dissolution? What is to become of the copies that have been distributed? With reference to the Lords (because there must be the same rule applied to both Houses of Parliament), who are the Members of the House of Lords to whom this Privilege of reading the Papers printed for the use of the House is to be extended? The Scotch and Irish Peers, without a seat, are no doubt to be excluded; but the Judges receive a summons to attend the House of Lords. The Attorney and Solicitor-general, the King's Serjeants, and Masters in Chancery, receive a summons to attend the House of Lords, and with the exception of one word their writ is the same as that of the Dukes, Marquises, Earls, and other Peers. Are they Members of the House of Lords within the meaning of this rule, and may they have a copy to enable them to advise, though they are not to consent? Or would it be an indictable offence for a Peer of Parliament to show a defamatory publication issued by the authority of the House to one of the Queen's Judges;—and this Judge, delivering it to his brother Judges, so that, passing from hand to hand, it is read by the fifteen—are they all liable to be indicted for a libel?

Then, my Lords, what use may the Members of the House of Commons make of their Papers if they, and they alone, are to have copies? Are they only to read them in their closet? If a representative visits his constituents, and he has a charge brought against him with reference to some particular vote he may have given, or a speech he may have made, may he not make use of this Report or Paper which has been published by the authority of the House? May he not read it from the hustings, and defend himself, and show that he has been a faithful representative of the people? If an

elector should deny the existence of such a document, may he not produce and vouch it in defence of his veracity?

But, my Lords, what is at last to be done with these copies? Suppose a Member dies, what are the executors to do?

What to be done with a Member's copy in case of his death or secession from Parliament?

Are they to burn the copy, or to destroy it in some other way, or would they thereby be guilty of a *devastavit*? Suppose that a Member takes the Chil-

tern Hundreds, and ceases to belong to the House, is

he then liable to an indictment for having in his possession or for reading a copy of the Report which was delivered to him when he was one of the 658? Upon a Dissolution all the Members of the House of Commons cease to be Members. Is there to be a grand *auto da fê*, and are all those Parliamentary Papers to be committed to the flames? What shall be reasonable time for their destruction after the Dissolution? May they not be read during the interval between the dissolution of one Parliament and the calling of another? If the publication be a libel, it cannot be read. A libel cannot be shown to another with impunity. The person who shows it is undoubtedly guilty of an offence for which an action or indictment may be maintained against him. During this interval between the dissolution of one Parliament and the calling of another, shall it be said that if two Members who belonged to the dissolved Parliament meet, the one may not show to the other this paper which was delivered to them while they belonged to the House? After a Dissolution they may be re-elected; but until they are re-elected, till the House meets again, they are in the same situation as persons who never were in Parliament? According to the doctrine for which my Learned Friend is to contend, those two Members of the dissolved House of Commons meeting and reading together a report delivered to them while Members might have an action brought against them, or, being prosecuted for a libel, might be sentenced to fine and imprisonment by this Court.

Then is it to be indictable to deliver copies of the report to a

Is it indictable to deliver Copies to Public Libraries,

public library? — Such has been the invariable practice hitherto. Copies of all parliamentary pro-

ceedings ordered to be printed by either House are sent to the libraries at Oxford and Cambridge, and the British Museum. But it is supposed now that this is an unauthorized publication, and that the librarian who may produce a Report containing defamatory matter for the inspection of a visitor is guilty of a misdemeanor. Luckily for the librarian who is to receive sentence for this novel crime, pillory is now abolished.

There has been a very laudable practice introduced of late of interchanging public Papers with Foreign States. We receive Papers from the French Government, and we transmit ours to them. Well, but the person who transmits this Report of the Inspectors of prisons to Paris to be placed in the Bibliotheque Royal, would be doing that which the law would not sanction, and which might subject him to punishment.

Is it possible that a rule which it is so impossible to obey—which cannot be observed—which leads to such preposterous and such mischievous consequences, can be the rule which the Court will sanction?—My Lords, I conceive the rule to be, that if the House authorizes a publication for general information, no one can possibly, under any circumstances, be liable to civil or criminal proceedings for acting under that authority. From this rule no inconvenience can arise, and it affords a clear and certain guide for the conduct of the Queen's subjects.

Now, my Lords, if I am put to argue the question, whether this Privilege does exist—let me consider—how is any privilege to be proved? I think in three ways; 1. By there being a necessity for the Privilege; 2. By its having been exercised; and 3. By its having been acquiesced in. According to these three tests, I shall clearly show your Lordships the existence of this Privilege.

The Privilege of Publishing to be proved in three ways:

1. By the necessity for it.
2. By usage.
3. By acquiescence.

First ground? Necessity.—Circulation among Members allowed to be necessary.

1. My Lords, is not this Privilege necessary? It may not be physically necessary in the same manner as it is necessary that Members must be permitted to

come to Parliament and take their seats in the Chamber ; but the arguments to show the necessity of this Privilege with regard to the use of the Members, I think show its necessity with regard to general circulation for the information of the public. As to the limited Privilege, which is not contested, there is no absolute necessity for it. All the Members might assemble in the House, and every Bill might be read over from beginning to end, and every Paper might be read from beginning to end. and the Members might be called upon to listen and to remember. This is supposed to be done ; but in practice it cannot be done. If it were done, it would not give the Members a fair and proper opportunity of considering the contents of any document, because unless they have a copy of the Bill, or a copy of the Report, or a copy of any Paper that is laid before the House which they can peruse and consider at their leisure, they cannot make themselves masters of its contents, and cannot be competent to form an opinion respecting it. What is done ? My Learned Friend admits that from necessity it may be printed, and that each Member may have a copy of it. And why is this allowed to be necessary ? Why, because the business of the House could not otherwise be conveniently transacted. Unless this were permitted, the House of Commons could not properly and efficiently discharge the functions which belong to it by the Constitution.

This is the ground upon which the necessity rests for allowing the printing for the use of the representatives. My

The same necessity for communicating to constituency.

Lords, I say that the same necessity exists with regard to the information to be communicated to the constituent body. The theory of the Constitution

supposes that there is a constant intercourse kept up between the constituents and the representatives. The constituents petition the

Constitution supposes intercourse between Representatives and Constituency.

House of Commons, the House of Commons publishes for the information of the constituents whatever Papers are supposed to be essential for the proper conduct of the business of the House. It is not all their proceedings that are published ; some

are secret, and necessarily must and ought to be so. The representatives of the people consider that others ought to be made public, and that they cannot properly exercise their legislative or inquisitorial functions unless their constituents are put in possession of this information. It is the duty of the constituents to watch the conduct of their representatives, and without information of the proceedings of their representatives, that duty cannot be performed.

Duty of Constituents to watch over Representatives.

My Lords, in the reign of Henry VIII. the Chancellor, in proroguing the Parliament, desires the Members to report in their counties what they have seen and heard; and in all times of our History since the House of Commons existed, it has been considered most essential that this free intercourse should be kept up between the House of Commons and those by whom the House of Commons is elected.

Temp. H. 8. Members desired to report what they had heard, in their Counties.

Consider the measures which it is competent for the House of Commons, as a branch of the Legislature, to initiate. The Parliament of England is supreme. Mr. Justice Blackstone says, "It can regulate or new model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of King Henry VIII. and his three children. It can change and create afresh even the Constitution of the Kingdom, and of Parliaments themselves, as was done by the Act of Union, and the several Statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible, and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament."

Power of Parliament. 1 Black. Com. 161.

My Lords, I say that the measures which Parliament from time to time has resorted to could not have been beneficially passed, could not have been carried into effect, and would not have been submitted to by the people, unless there had been this free communication between Par-

Necessity for communication with the People.



liament and those by whom the laws, when enacted, were to be obeyed.

I will beg leave to give your Lordships a few instances. The Monasteries were to be dissolved in the reign of Henry VIII. The people were very much attached in some parts of the country to those institutions. They derived great benefit from the charity doled out by the monks, and their professions of sanctity and abstinence were believed to be sincere. But there were Commissioners appointed to inquire into the abuses and vices which prevailed among them. The Commissioners made a report, showing those abuses and vices to a frightful extent. It is stated by Mr. Hume and other historians, that, in order to prepare the nation for the dissolution of the Monasteries, the reports of the Commissioners were published and circulated among the people; and if the people had not been prepared by the circulation of those reports, they probably would have considered the Statute of the 27th Henry VIII., by which the Monasteries were dissolved, as an act of sacrilege and spoliation.

Instances of such communication.

Suppression of Monasteries, 27 Hen. 8, c. 28, A.D. 1555.

Let me refer your Lordships to the Exclusion Bill, which twice passed the House of Commons in the reign of Charles II., when the heir presumptive was to be set aside, and a new line of devolution was to be given to the Crown. Could it be expected that the people would submit, unless the grounds were previously laid before the people, upon which that measure was to be justified? It was for that reason that the Parliament, of which Sir William Williams was the Speaker, published to the world some of the facts upon which the Exclusion Bill was to be justified.

Exclusion Bill, temp. C. 2. to alter succession to the Crown.

But let me take a more recent instance,—the Regency Bill, in the reign of George III. Was it not of the last importance for the peace and tranquillity of this country, that before the Regency Bill passed, by which in fact the Sovereign upon the Throne was superseded, the people should be informed of the facts by which it was rendered necessary?

Regency Bill, temp. Geo. 3.

My Lords, the *habeas corpus* Act has been repeatedly suspended.

Cases of suspension of *Habeas Corpus*.

Can it be expected that the people would submit even to a temporary loss of their liberties, unless they were previously shown the necessity for so severe a restriction?

So, my Lords, as to measures more within the scope of ordinary legislation,—such for instance, as the recent Abolition of Slavery in our Colonies—the Reform of Municipal Corporations—the amendment of the Poor-laws,—all these measures have been preceded or accompanied by the publication of Reports from Committees of the Houses of Parliament, which of necessity contained much criminatory matter.

Abolition of slavery, &c.

My Lords, with regard to gaols, the subject to which this publication peculiarly refers, is not this power of communication necessary both for efficient enquiry and useful legislation? There has been a great deal said of late of the discipline of gaols, of solitary confinement, of the silent system, of the restraints that are to be put upon receiving books, and the manner in which the prisoners are to spend their time. Is it not of great importance that the public should be informed of the grounds upon which any bill should pass for the regulation of gaols? If there are to be additional restraints—if there is to be the silent system established—if there is to be solitary confinement—if there is to be a check put upon the free introduction of books, is it not most desirable first to disclose to the public the grounds upon which the new plan is to be defended, and to prepare the people to do all in their power, by their co-operation, to carry it into effect, instead of the public sympathy being excited in favour of those who might be considered the victims of needless severity?

Present Report as to regulation of Gaols.

Again, my Lords, how are the inquisitorial powers of the House of Commons to be exercised advantageously, unless they have the means of informing the public of the grounds upon which they proceed? If they were to inquire into the conduct of a Magistrate, and to

Inquisitorial powers of House of Commons cannot be properly exercised without giving in-

ormation to the  
People.

address the Crown that he might be removed from  
the Commission of the Peace, would it not be unjust

to that Magistrate, would it not be unjust to the public, that the  
House should not have it in their power to communicate the infor-  
mation upon which they acted? There was an investigation in the

Instances :

Address to re-  
move Magistrate.  
Mr. Kenrick's  
case.

House of Commons, a few years ago, respecting the  
conduct of a magistrate, Mr. Kenrick; my Lord  
Denman will remember it. I think his Lordship,

when a Member of the House of Commons, took an  
active part in it. That was a most useful exercise of the inquisi-  
torial functions of the House of Commons. It was extremely im-  
portant that the charges against Mr. Kenrick should be inquired  
into. I say that it was due to him and to the community, that the  
facts which were proved in the course of the inquiry, should not be  
confined to the 658 Members of the House of Commons, and ac-  
cordingly they were laid before the British people.

But let me put this case. By law, although the Judges are  
happily independent, and I hope ever will remain so, there is a

Address to remove  
Judge.

power given to the Crown upon an Address of both  
Houses of Parliament to remove them. Suppose

that a Kelynge, or a Jefferies, or a Scroggs, should  
again arise, and there should be a charge brought against such a  
Judge, and both Houses of Parliament should agree in addressing the  
Crown to remove him. Or suppose, what may happen at some  
distant time, that a Judge, from age or infirmity, should be utterly  
incompetent to perform the duties of his office; can it be doubted  
that either House of Parliament would be justified in making an in-  
quiry into such a case?—They may find that the charge is well-  
founded, and may address the Crown for the removal of the Judge.  
But, my Lords, what would the public say, unless they were in-  
formed of the grounds upon which the House of Commons and the  
House of Lords proceeded? The public properly have the utmost  
reverence for the Judges; they would deeply resent any attack upon  
their independence, or their character, or dignity, and I say that  
the public would be highly dissatisfied, unless they were informed,

and informed before the act done, of the grounds upon which a Judge is to be displaced. And shall it be said, that if corruption shall be proved against a Judge, and the Commons have inquired into it, and wish the public to be informed of the evidence laid before them to convict him, this corrupt Judge may bring an action against an officer of the House of Commons for authorizing the publication of that evidence?

My Lords, with reference to part of the proceedings of the House of Commons, I will show your Lordships the absolute and indispensable necessity that they should be published, and I will show your Lordships that there

Absolute necessity for publication of Votes and Journals.

is in point of law, no distinction between that part of their proceedings which must inevitably be made public and this paper, the publication of which we are now considering. With reference to the Votes and Journals of the House of Commons, they must be made public. The Votes of the House of Commons are notice to

All persons bound to notice the Votes.

all the world of what those Votes contain. All persons are bound to take notice of the contents of the Votes. The House of Lords have repeatedly said that they would take notice of the Votes of the House of Commons. With regard to bringing in private Bills, with regard to the observance of the Sessional Orders, with regard to election petitions, with regard to everything to which those Votes apply and in which the public is concerned, notice must be taken of them

Many of the orders of the House of Commons have the force of Law.

at the peril of the parties. Many of the orders stated in the Votes have the force of law; and will you not allow the people to know what the law is? To deny this, and to punish for the ignorance of that which you will not allow to be known, would be a tyranny for which there is no precedent in modern history. With regard to

Journals are publici juris.

Journals of House.

the Journals, they are *publici juris*,—any person has the right to go to the House of Commons and inspect the Journals, and take a copy of any part of them in which he has an interest. The Journals of the House of Lords are matter of record, they are ad-

of Lords are records.

mitted to be records ; whether the Journals of the

House of Commons be so or not is yet a controverted question ; but the Journals of the House of Lords are to be treated as records, like rolls recording the proceedings of this High Court which I have the honour to address.

Then the Votes and Journals being open to all the world, and any person having a right to make a copy of them, or to circulate them, I wish my Learned Friend in his reply to tell me distinctly whether for any thing that appears in the Votes or the Journals, they being

Would an action or indictment lie for matter contained in Votes or Journals ?

circulated for the public information, an action or indictment would lie against the printer of the House of Commons, or against the Speaker of the House of Commons ? Would an action or indictment lie against the Lord Chancellor presiding in the House of Lords, or against the printer of the Lords, if any thing criminatory appear in their Journals ? If my Learned Friend says it would, then I think he will lay down a very monstrous and startling proposition, which must very much alarm all who have presided on

No distinction between Votes and Journals, and Papers occasionally inserted in Votes and Journals, and occasionally published separately.

the Woolsack, or who aspire to preside there, because there may be and often has been criminatory matter introduced into the Journals of both Houses of Parliament. In truth, your Lordships will see that there really is no distinction between the Votes and Journals, or between them and those papers which are sometimes inserted in the Votes and Journals

and sometimes are separately printed.

My Lords, I must have a direct answer from my Learned Friend, as to whether he says, that for what appears in the Votes and Journals of either House of Parliament an indictment, or an action will lie against those ministerially concerned in the printing and publication of them. It would be monstrous to say, that an indictment or an action would lie against the Printer or the Speaker of the House of Commons for that which appears in the Votes and Journals,—which are and always have been for public information,—which the public have a right to examine,—of which they have

a right to take a copy,—and which may be given in evidence in a Court of justice.

The Journals of the House of Commons I have known repeatedly to be given in evidence in this Court; and they may be given in evidence just as much as the Records of any Court of Justice in Westminster Hall.

Journals of House of Commons receivable as evidence in Courts of Law.

I think I may, without presumption, say, that if there could be no action or indictment for that which appears in the Votes or Journals, there can be none for papers which, having become part of the proceedings of the House are separately published. The Report in question had become part of the proceedings of the House, and is allowed to have been published by the authority of the House.

Report in question part of the proceedings of House of Commons.

The Votes formerly contained all the Proceedings.

What are the Votes?—The Votes merely detail a part of the proceedings of the House. My Lords, anciently the Votes contained every thing. If you will go a certain way back you will find even the speeches of Members sometimes stated in the Votes. According

Sometimes even the Speeches.

to the present practice, (if your Lordships are judicially to take notice of it,) it often happens that with the Votes petitions are published; they are published in what is called a Supplement to the Votes, forming a part of the Votes themselves. The Report giving rise to

Petitions are often now published in Supplement to the Votes.

this action might have been published in a Supplement to the Votes, and so in fact have become a part of the Votes. It might have been entered in the Journals; there might have been a debate upon it. We may suppose that some Member had moved that it should be read, and that some question had arisen whether it should be printed or not; Ayes, so many; Noes, so many; and then the paper itself, this very report of which Mr. Stockdale complains, would appear in so many words in the votes of the House of Commons. So it might appear in the Journals of the House of Commons. There might have been the division to which I refer; it would then appear upon the Journals of the House of Commons as well as

in the votes of the House of Commons, and my Learned Friend now must make his election, and say whether the Speaker of the House, or the printer printing by his order, is liable to be indicted if any thing criminatory shall appear in the Journals which he has ordered to be printed according to the duty imposed upon him as Speaker of the House of Commons.

It turns out, therefore, as I humbly apprehend, that the Votes and Journals may *ex concessis* be printed for general use; and it turns out that there is no distinction between the Votes and the Journals which contain part of the proceedings of the House, and other parts of the proceedings of the House that may be separately published. It must depend upon the will of the House whether these are all printed together, or whether if more convenient, they may be printed separately. They are still a part of their proceedings, and the proceedings of the House it is lawful for the House to order to be published.

2. Now, my Lords, I come to the question of Usage; and if your Lordships, upon the arguing of this Demurrer, will inquire into the existence of Privilege, it becomes indispensably necessary that the facts on which it depends should be investigated. I do allow that this inquiry is most anomalous—I point it out to your Lordships as most anomalous—I denounce it as most anomalous; I say that it ought not to be, that it cannot be permitted,—I say that your Lordships are bound by what appears on the record, and that your Lordships cannot look beyond the plea justifying the act complained of, under the authority of the House of Commons in the exercise of Privilege, and the Resolution of the House of Commons set out upon the plea declaring the law of Parliament upon this subject. It does seem most strange that I, upon arguing a Demurrer, am to search the Journals of the House of Commons, and to point out various facts for your consideration, which if there had been an issue of fact might have been material to be taken into consideration by a Jury. But however, my Lords, in arguing the existence of the Privilege, if we are not to confine our-

Usage.

Most anomalous inquiry for the Court to entertain upon a Demurrer.

selves to the Record, it becomes indispensably necessary to follow the course which would be pursued in the House of Commons,—to see what, in point of fact, the usage has been. In the case of *Lake v. King*, a case I shall by-and-by bring particularly before your Lordships, where the Court had no means by examining the Record—of knowing what the law of Parliament was,—the Judges consulted Parliament men as to what was the usage of Parliament, but said, they would take judicial notice of it when they had ascertained what it was. But it is quite clear, that it does not lie in the mouth of my Learned Friend, Mr. Curwood, to make any objection to my stating the facts which I am now going to bring to your notice, for he could only make the objection by saying that your Lordships have no jurisdiction at all upon the subject. If he says so, *cadit questio*;—and upon my first ground I am entitled to your judgment.

Now, to save your Lordships' time,—that I may not go over all the entries to be found in the Journals,—I must use the freedom to refer you to the recent Report of the Committee of the House of Commons upon the subject. Besides the instances of printing and publishing that are set out by the Committee, there are a good many others to the same effect, of which I have a list in my hand. I will state what I consider to be the result of this evidence. I am now upon a question of fact, arguing a demurrer, and I must state the result of the evidence.

Instances of usage collected in Report of Committee of Privileges of House of Commons, 8 May, 1837.

Earliest express proof of publishing in 1641. Same origin for printing for use of Members.

There is no express proof of usage earlier than the year 1641, but there is the same origin given to a publication for general circulation, as to printing for the use of the Members. There is no proof to be found of printing for the use of the Members before the year 1641, and if there is to be an argument against me, by reason of recent origin, it would apply to printing for the use of the Members, just as much as to printing for the use of the public.

Your Lordships are aware, that till the reign of Elizabeth there is



Before invention of printing some other mode of circulating information by Parliament probably in use.

no proof, by the actual exercise of the Privilege, even of the power of commitment itself. My Lords, in all probability in very early times, before printing was invented, there were other means employed for the purpose of circulating the information that Parlia-

ment thought it essential the public should possess. Acts of Parliament were formerly published in the County Courts and other local

From 1641 to 1680, various resolutions for printing specific papers. Instance in Thompson's case, 8 How. Sta. Tri. 1, 32 C. 2, A.D. 1680.

tribunals, and there is very little doubt that the same medium of publication might be adopted by Parliament for any other information that it was thought expedient to communicate. The earliest order for printing I think is the 30th of July, 1641. It was then ordered, that the Resolutions of the House should be printed. From 1641 to 1680, there are

various Resolutions for printing specific votes and papers, and an example of the manner in which that is done your Lordships may see by referring to Thompson's case in 1680. Here is the form adopted by the Speaker, "I appoint Francis Smith and Benjamin Harris to print this Report and Resolution perused by me, according to the order of the House of Commons, and that no other person presume to print the same." In this manner, for a long course of years after 1641 the matter was conducted. The Speaker appointed particular persons who were to print and to sell the paper, and they alone were to do so.

General resolution for printing Votes and proceedings of the House, A. D. 1680. Renewed every Session.

In 1680 a general resolution was adopted for printing the votes and proceedings of the House. This order has been renewed every Session, and by authority of the House a printer has been appointed by the Speaker for that purpose; that is, with regard to the general votes and proceedings of the House. Then Reports and

Miscellaneous Parliamentary Papers have also from time to time been printed under the distinct orders of the House. To this course the single exception is to be found in the year 1702, when the general order for printing the votes and proceedings was for a short time suspended. But even during that interval, when

the general order was suspended, there were orders for printing and publishing particular Papers, and these were not all confined to the use of the Members. From the statements in the Report, and the evidence subjoined, it will appear that a considerable surplus of copies beyond what was required for the use of the Members, remained in the stores under the control of the officers of the House, and that it was usual for the Speaker to authorize the supply of additional copies of Papers to such Members as might desire them.

Sale of Parliamentary Papers has always prevailed.

The sale of Parliamentary Papers has always prevailed to a considerable extent, and though not formally authorized, yet with the full knowledge not only of individual Members, but of the Speaker and the officers of the House.

Objection as to origin of usage during Long Parliament; but before C. I. withdrew.

Statutes passed at that time are still law.

My Lords, it has been said that this began during the Long Parliament;—but it began when the King was in his palace;—when the Government was regularly proceeding;—when there was a constant intercourse kept up between Charles I. and the Parliament,—and when Acts were passed which are now the law of the land. It is said by Hatsell, and by other writers, that precedents are not to be quoted that occur after Charles I. had left London and had gone to erect his standard in the North, abandoning Parliament to their own course of proceeding. My Lords, the precedent upon which I rely occurred before that era, and while Charles was in full possession of the Government.

Usage continued after Restoration without interruption.

The same course was continued upon the Restoration, and from thence down to 1680 without interruption, and no doubt ever was entertained at that time of day respecting its legality.

Debate in H. C. on the subject; 4 vol. Parl. Hist. 1306, 32 Car. 2, A. D. 1680-1.

I wish also to draw your Lordships' observation to a debate on the subject that occurred in the House of Commons in 1680, when (with the exception of Mr. Secretary Jenkins) it was unanimously agreed that the practice should be persevered in. I will only read one or two

very short extracts from this debate, to show what was the general understanding on this point of the most eminent men at that time.

Sir John Hotham says, "The last Parliament, when you were moved to print your votes, it was for the security of the nation, and you found it so; it prevented ill representations of us to the world by false copies of our votes, and none doubted your honour in the care of it; and I am confident that this House will be no more ashamed of their actions than the last was. Printing our votes will be for the honour of the King and safety of the nation. I am confident, if it had been necessary, you would have had petitions from the parts I come from, that your actions might be made public."

Sir William Cooper says, "That which put me upon moving the printing your votes the last Parliament was false papers that went about, in former Parliaments, of the votes and transactions of the House. Let men think what they please, the weight of England is the people."

The only objection that was made came from Mr. Secretary Jenkins; and he does not at all question the legality of the practice; he only doubts the expediency of it, and whether it be according to the dignity of the House. He says, "I beg pardon if I consent not to the motion. Consider the gravity of this assembly. There is no great assembly in Christendom that does it. It is against the gravity of this assembly, and it is a sort of appeal to the people. It is against your gravity, and I am against it." My Lords, he was a great lawyer; if he had considered it illegal he would have rested his objection on that ground.

From 1641, many of the papers printed by order of the House purport on the face of them to be printed and published "By Order," with the appointment of the Speaker for printing set out on the back of the title-page,—sometimes with a note at the foot of the paper that the same were sold at the shop of the person who printed. This mode of selling by the printer continued till past the middle of last century.

From 1641 to latter half of 18th century, many papers are printed by a particular printer, and purport to be published by order of H. C.

Since then, and till recently, these papers have been printed only by the printer of the House; and there has been no appointed place for the sale of them; but they were printed for distribution and circulation.

Afterwards printed by printer of the House.

The number of copies printed has always considerably exceeded the number of Members of the House, and has varied according to the probable demand, from the public interest taken in the subject.

These are all facts quite inconsistent with the notion of the printing only of 658 copies for the use of the Members. The extra copies have been distributed to the public in different modes, as detailed in the Report to which I have referred; but there is no doubt that these papers were made accessible to the public, partly by purchase from officers of the House, partly by gratuitous distribution under authority of the Speaker, and very generally from copies obtained by application to Members of the House. The public libraries have always been supplied with copies of all these publications; and in these public libraries they have been perused by all inquirers, without the apprehension of action or indictment.

It is material for your Lordships to bear in mind, that the orders of the House for printing have been in two distinct forms,—one directing the printing in general terms, the other for the use of the Members. Sometimes, upon a reference to the Journals (if your Lordships are to refer to the Journals), you will find that upon debate, the general printing is negatived, and a limited resolution adopted. Your Lordships may think it not immaterial that the House negatived the vote for the general printing, and ordered it only to be printed for the use of the Members, where they judged it was unnecessary that it should be for general circulation. There are cases in which certain papers having been directed to be printed for the use of the Members,—there are second orders, which are made after a short interval, for printing the same papers without any such restriction. When a paper is first printed for the use of the Members, and is afterwards ordered to be printed without any restriction whatever, there is a much larger impression than when it was printed for the use of the Members.

Now with regard to sale; the open, avowed, notorious sale of the Votes and usual proceedings has continued without any interruption whatever for above 150 years. I was before speaking of occasional papers that were separately published; I am now speaking of the Votes and usual proceedings. The sale has continued by the printer appointed by the House without interruption since its commencement,—an open sale to all mankind of everything that appeared in the Votes and the Supplement to the Votes,—which might have included this very publication.

Votes and usual proceedings have always been sold.

At first, my Lords, the whole expense of the paper and printing of the Votes was defrayed by the sale, and a profit remained, which was accounted for to the Speaker. Subsequently, the expense of printing having become more than the receipts, the account was transferred to the Treasury. The printer has accounted for sums received, and the deficiency has been paid to him by the public. Thus any person might, as of right, procure all these Votes and Proceedings, upon paying a regulated price.

Formerly whole expense of printing defrayed by sale. Subsequently, the expense being greater than the receipts, the account transferred to the Treasury.

Then with regard to the papers published separately, and not ordered to be printed and sold by a particular printer.—*De facto* there has been no difficulty in any person, for money, getting a set of all Parliamentary Papers,—from time to time as they have been published,—during the Session,—or at the end of the Session,—or in obtaining a similar collection during any period which he might think it material that he should possess them. The Speaker has from time to time distributed sets—not only among Members, but given them away to all who solicited them, and who he thought would make a proper use of them. Upon the application of a Member of the House, in favour of his constituents or of his friends, there has never been the slightest difficulty in procuring and circulating any papers that the House has ordered to be printed.

Parliamentary papers might always be obtained.

Here you have usage therefore for the privilege such as it is set

out upon this record. The usage may have subsisted much longer ; it may have begun soon after printing was invented ; it may have been a substitution for another mode of publication that had formerly been adopted, and which may in substance have been practised as long as the House of Commons has existed. But setting aside conjecture and probability, you have direct and positive, and incontrovertible evidence of an uninterrupted usage for a period of two centuries.

Now, my Lords, will my Learned Friend say that this usage has been confined to publications that were not criminal?

Papers so published often contained criminal matter.

No ; I am sure he never will take such ground. There have been constantly publications of this sort which have brought most serious charges against individuals, whose wounded feelings were thought to deserve less consideration than a regard for the public good. My Lords, I may

Instances.  
Reports on South Sea Bubble ;  
Slave Trade ;  
Municipal Corporations.

refer, as instances, to the Reports respecting the South Sea Bubble, to the Reports respecting the conduct of the Slave Trade, and to the Reports respecting Municipal Corporations ; I give these only by way of sample. There can be no doubt that every Session

there have been papers published by the House containing criminal matter—not libels, because to use the word

Criminal matters so published not libellous.

“ libel ” is merely begging the question—a libel is an unjustifiable publication which the law condemns—

but containing criminal matter. I believe there has been no Session for nearly two centuries, in which there have not been publications by the authority of the House, which, if distributed without authority, might have been called libels, and which would have afforded the foundation of an action or indictment.

3. So much as to usage ; and having shown necessity and usage, I am now to show acquiescence. My Lords, it is only necessary for me to point out to your attention that, with the exception of what was done in the lawless reign of James the Second, reprobated equally by my Learned Friend and by myself,—from the time these publications began, down to

Third Ground.  
Acquiescence.

the time Mr. Stockdale brought his action, there has not been one action brought, or one indictment preferred, for any publication by either House of Parliament. But according to my Learned Friend there is no privilege, no protection, for these publications; every person not a Member of Parliament is liable to an indictment, or

Where no action brought, strong presumption that none would lie. Littleton, sect. 108.

Per Buller, Justice, in *Le Caux v. Eden*, 2 Doug. 601.

an information, or an action, who has possessed or made any use of them. Is not this acquiescence? My Lords, I referred your Lordships yesterday to Littleton, s. 108, where, speaking of the Statute of Merton, he says, that "no action being brought, proves that no action will lie." So Mr. Justice Buller says, that "an universal silence in Westminster Hall on a subject which so frequently

gives occasion to litigation, is a strong argument to prove that no such action can be sustained,"

My Lords, it would be monstrous to say that the printing for public use is now an innovation, and is actionable. I have shown your Lordships that it has been practised for two centuries, and that it has prevailed without any question or objection. The innovation is not in the practice of which my Friend complains; the innovation is in bringing this action, which is *primæ impressionis*, and is unsupported by any analogy.

I would just ask my Learned Friend what he would say to a Bill that is passing through Parliament? Must the number

Are copies of Bills to be limited to use of Members?

Such as a Bill for disfranchising a borough for corruption.

of the copies of that Bill be limited to 658? If there be a Bill for disfranchising a borough for corruption, and containing charges against individuals, may not that be circulated in the borough, that those who have an interest in it may be made aware of its contents, and may have an opportunity of refuting what

is there stated, and of defending their rights? Does my Friend take a distinction between a Bill passing through Parliament and any other part of the proceedings of the House? I can see no distinction, and if this doctrine were to prevail, any person who in the preamble of a Bill might be said to have committed any offence for which he

is to be punished, upon proving that a copy of this Bill has been exhibited to a person not a Member, might bring an action or prefer an indictment.

Just see the consequence which will necessarily follow from the doctrine of the responsibility of the Speaker. Every person who thinks that his character is at all affected by such a publication as this, may call the Speaker before any tribunal, either civil or criminal, and it is to be submitted to that tribunal whether, according to the law of libel, he is guilty or innocent. And if there be anything that is published which is libellous, according to the definitions we have of a libel in the books, then he may be convicted and punished. It has been said that whatever is hurtful to the feelings of another is a libel, and if there be anything hurtful to the feelings of an individual in a report of the House of Commons, the Speaker is to answer for the alleged libel.

Consequences that would follow from responsibility of the Speaker.

According to legal definition, everything hurtful to another's feelings is a libel.

My Lords, I find it laid down in Hawkins's Pleas of the Crown, that it is a libel to attack any private individual; and it is there said, "it is certain that it is a very high aggravation of a libel that it tends to scandalize the Government, by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition."

Hawk-P. C b. 1, c. 28, s. 7.

Reflections on Government are libellous.

According to this doctrine, if there be any resolution of the House of Commons which tends to criminate the Ministers of the Crown, and this is published in the usual way, the Speaker of the House of Commons, and all concerned, are liable to be indicted for such a publication; and, moreover, the Attorney-general might file his criminal information against the Speaker, after the

Would Speaker be liable for ordering publication of Resolution of H. C. criminating a Minister?



fashion of Sir Robert Sawyer in prosecuting Sir William Williams.

What may happen on a change of Administration? A dissolution of Parliament takes place. If the nation approve of the change, a House of Commons is returned with a majority to support the new Minister. There may then be prosecutions directed by the triumphant party against their opponents who have fallen from power,—in the shape of indictments or informations for publishing the proceedings of a former Parliament.

My Lords, in what a situation is the Speaker to be placed? Or, the Lord Chancellor, for he is the Speaker of the House of Lords, and he would be placed in a situation of equal peril. He has not the same authority as the Speaker of the House of Commons; he cannot control the proceedings of the House of Lords in deciding questions of order; he does not select the peer who is to address the House; but he is the Speaker of the House of Lords——

Lord Brougham.—He merely puts the question; he need not be a member.

Mr. Attorney-General.—He need not.—I know a memorable instance of a Lord Chancellor who took his seat on the Woolsack, and was Speaker some hours before he was a Peer.

Lord Brougham.—Yes, yes.

Mr. Attorney-General.—If the Lord Chancellor does not sign the orders for printing and publishing papers, the clerk does. The present Earl of Devon, the late clerk, has a very lively interest in this question; he would be amenable for all that he has signed, and all that was done by him under the orders of the House. But is the Speaker to be thus answerable for the contents of the Votes,

Journals, and all separate publications! He is ordered by the House to do certain acts; if he does not do them, he will be liable to be displaced, and sent to the Tower of London; and if he obeys, Mr. Stockdale brings an action against him, or an indictment, and he is liable to be sent to Newgate. This

If Speaker is ordered to authorize publication and disobeys, liable to be sent to Tower; if he obeys, liable to action or indictment.

is the situation in which the argument of my friend would place the Speaker of the House of Commons ; for it is vain to try to make any distinction in this respect between the Speaker and any other officer acting by the authority of the House.

I have now, my Lords, to mention an argument that has been brought forward in support of this right of the House of Commons, which arises from the Postage Act,—section 10 of which enacts, “that it shall be lawful for every Member of both Houses of Parliament of the United Kingdom to send by the post, within the said United Kingdom, any printed Votes or Proceedings in Parliament, free from the duty of postage, so as the same be sent without covers, or in covers open at the sides, which shall be signed on the outside thereof by the hand of any Member of Parliament ; and also that it shall and may be lawful to and for each and every Member of both the said two Houses of Parliament to authorize printed votes and proceedings in Parliament to be sent by the post, free from the duty of postage, addressed to him at such place and places within the United Kingdom as he shall have previously given notice in writing to the Postmaster-general, either at London or Dublin.”

What use do I make of this ? It does not necessarily amount to a legislative declaration that there shall be immunity for such publications ; but what it does show, and what it is impossible for my learned Friend to deny, is, that the Legislature contemplated that these Parliamentary papers would be generally circulated among the public, and would not be confined to Members of the House,—which is really the question between us. The line on which he stands is, “the use of Members :” If I show that this is not the line,—none other short of general circulation is contended for,—and I am entitled to your Lordships’ judgment. That Act of Parliament is a demonstration that the Legislature conceived that the circulation was not to be confined to Members ; for it gives Members the power of sending all those Parliamentary Papers free of postage to their constituents,—to all the world, at their discretion. If, my Lords, it

Postage Act, 42  
Geo. 3, c. 63, s.  
10. A.D. 1802,  
Parliamentary  
Papers not con-  
fined to use of  
Members.

were supposed these Parliamentary Papers were to be confined to the use of Members, the only immunity that could have been given would have been when they were addressed to Members ; that is, if the Member was in the country at his seat, he might receive the papers free from postage; but, my Lords, the immunity is also to all those packages sent by the Member to his constituents and among the public. This, therefore, not to put it higher than I am justly entitled to, is a legislative declaration that these papers are not to be confined to the use of Members. The same right is given respecting Parliamentary Papers as to newspapers, showing that it was the contemplation of the Legislature that the circulation of these papers should be equally extensive. But, my Lords, if the intention was, that these papers should be for general circulation, it never could be meant that the Speaker, or any other officer or servant of the House of Commons, should be liable for their contents.

Objections urged against privilege of publication.

1st Objection.  
That it is altering the law of the land to declare libels may be lawfully sold.

Now, my Lords, I will mention all the objections I am aware of which can be urged against the power or privilege in the House of Commons for which I contend.

Say some, it is altering the law of the land to declare that libels may be lawfully sold. I am quite astonished to find such language used where it could hardly have been expected. Why, my Lords, it is *petitio principii*—it is begging the question. Say

they, “The House of Commons cannot change the law of the land;” but that is assuming that by the law of the land the House of Commons have no right to order this publication. If they have no such right, *cadit quæstio*; but you are not to assume that they have not the right for the purpose of proving that they have it not.

Again, my Lords, it is asked, “Shall the House of Commons open a libel-shop? This is the same objection put in other words, and is again begging the question; for it is assuming that this publication is a libel, which is to be proved, and which can only be proved by assuming that it is published without authority. According to

2d Objection.  
That the H. C. ought not to open a libel-shop.

this mode of reasoning an indictment may equally be called a libel, and the office of the clerk of assize may be denominated a libel-shop.

Next, we are told of the hardship and injustice to individuals. It is said, "Shall a private individual suffer from an illegal act, and have no remedy? Here you have a wrong and no redress." This again is begging the question. You are not to assume that there is a wrong; you must show that there is a wrong, and there must be *damnum cum injuriâ* before there is a just cause of action. Neither by the law of England, nor of any civilized country, is an action given merely because loss has been sustained, or because some inconvenience has been felt. By the law of England on this subject, to which I before referred, there may even be a wrong without a remedy. If a man is called a coward, liar, or scoundrel, or if a woman has applied to her the most opprobrious expression that can be applied to her sex, there is no action, no indictment; for it has been thought that less inconvenience is suffered from allowing such attacks on reputation to go unredressed, than would arise if words of heat and passion could always be made the subject of legal proceedings.

My Lords, suppose a prosecution for felony, and an honourable acquittal; the prosecutor is not necessarily liable to an action. Though the most grievous injury has been received by the party falsely accused, though in vindicating his innocence he has been put to ruinous expense; and though pending the prosecution, he and those dear to him may have suffered the most cruel anxiety,—he has no remedy or redress, unless he can show that the prosecution was malicious, and without probable cause.

My Lords, no action will lie against a witness for any evidence he has given; no action will lie against a counsel for what he says in discharge of his duty in a Court of Justice, however painful it may be to the feelings of an individual; no action will lie for a committal by either House of Parliament however arbitrary and unjust. *Paty* had no remedy, though I allow he was very ill used. Why?

Because the law could not give that remedy to him without depriving the two Houses of Parliament of Privileges essential to the public.

No action lies against a commander for suspending an officer ; no action lies against the Postmaster-general for the loss of a letter, though he receives a salary for his services, and appoints the officers to act under him ; no action lies for any confidential communication *bond fide* made ; no action lies for literary criticism, however severe, so that it is not written with a view to private defamation ; no action lies for exhibiting articles of the peace, however false or defamatory the allegation in those articles may be.

My Lords, for the safety of the State, the rights of property and liberty may, under certain circumstances, be encroached upon without legal indemnity to the suffering individual. Trespass *quare clausum fregit* would hardly lie against the commander of the Queen's forces at the suit of the occupier of a field on which a battle is fought against an invading enemy. If a seaman, returning from a long voyage, is impressed and sent to a distant quarter of the world without seeing his wife and children, he has no remedy. Therefore if it could be shown (which I think it cannot), that private inconvenience would arise from the exercise of this public right, it does not follow, for that reason, that the law gives redress by action.

But it has been said, that this power cannot belong to the House of Commons, because the House of Commons, by the mouth of its Speaker, at the beginning of every Parliament, asks for certain Privileges from the King ; these are conceded by the King, and such only can be exercised which the King grants. To this extent has the argument been carried by some who deny this Privilege. But I need not remind your Lordships that the Privileges of the House of Commons are inherent ; they are as ancient as the prerogative of the Crown. Speaker Cheney in

4th Objection.  
That the Speaker at commencement of Parliament claims certain Privileges from Crown, and this is not among them. Origin of prayer, *temp.* Hen. 4. Privileges not held by favour. Protest of H. C. *temp.* J. 1. Com. Jour. 18 Dec. 1621. 1 Hats. 78.

Prayer of Speaker  
mere form, like  
homage of people  
at Coronation.  
Protest of H. C.  
torn out by J. 1.  
1 Hata. 79. 139.

the reign of Henry IV., is said to be the first who ever presented such a prayer; and when James I. pretended that those Privileges were held of grace and favour, your Lordships will remember the spirited protest that was entered on the Journals of the House of Commons, claiming them as the birth-right of Englishmen. Although that protest of the House of Commons was torn out by James I. in the presence of the Judges, I hope that the Judges of the present day would not sanction such a proceeding, but would declare their opinion that the allegations in that protest are according to the law and constitution of England. The prayer of the Speaker is a mere form, similar to that which takes place at the coronation, when the homage of the people is asked by the Archbishop for the new Sovereign. Homage and allegiance cannot be withheld; and without a coronation the Sovereign upon his accession is invested with all the attributes and prerogatives which belong to the Crown.

5th Objection.  
That the Privilege  
is unnecessary, and  
that Parliament-  
ary papers might  
be circulated in  
the same manner  
as the debates.

Again my Lords, it has been said, that this immunity which we claim is unnecessary, and that without it Parliamentary papers would be sufficiently circulated, as the debates in Parliament now are. There is a marked distinction between publishing the debates and publishing these papers. There are only certain papers that are to be printed; there are only certain papers that are to be generally circulated; the House exercises its discretion as to whether a publication shall take place or not, and an order is made in each particular instance. That order must be carried into effect by the Speaker, and the officers of the House; it cannot be carried into effect without their intervention and agency; and unless the immunity were established for which I contend, then in every particular case they would be answerable for the contents of every particular document.

With regard to the publication of debates, it is a totally different matter. This is done without the authority of the House; an order is made at the beginning of every Session for the exclusion

of strangers. This is generally waived, but may at any time be enforced. The House still exercises a Privilege that has always belonged to it, of keeping secret its proceedings whenever it thinks fit. On various occasions this has been most essential to the due discharge of its functions. The object of it was to conceal from the Crown the measures that were in agitation in the House of Commons, so as to prevent a premature prorogation or dissolution and its consequences. It was essential that the House should thus retain to itself the power of determining what parts of its proceedings should be made public, and what should remain secret. When the struggle between Privilege and Prerogative was going on, it was only by the exercise of that power, that the Commons preserved to themselves the enjoyment of their constitutional rights.

6th Objection.  
That House may  
publish Reports  
containing useful  
but not crimina-  
tory matter.

Then, my Lords, it has been said, that there may be publication of useful, without any libellous, matter. This is like awarding the "pound of flesh without a drop of blood." How is it possible to publish Reports about the South Sea Bubble, or the Slave Trade, or the Municipal Corporations, so that they may contain nothing to hurt the feelings of individuals?

It has been said, "leave blanks for name," but that would only aggravate the mischief.

At least, "do it in a Parliamentary way." My Lords, this is the language of the Judges, which I submitted to your Lordships for your reprobation in the course of yesterday,—it being formerly held by the Judges, that while the Members of the House of Commons confined their language to what was Parliamentary, they might escape with impunity; but if they did anything, or said anything, in Parliament not in a Parliamentary way, they were immediately subject to the jurisdiction of the courts of common law, and might be proceeded against in the Star Chamber. This proposal seeks to make your Lordships censors of all Parliamentary proceedings.

It is utterly impossible for the important right of giving information by the publication of Parliamentary papers to be carried

into effect unless it goes to the full extent, that for that which is published by authority of either House, be it criminatory or not, there shall be no legal redress.

My Lords, the last scheme I have to mention, and I shall try to do so with great respect, considering the quarter from which it originated, is this,—you may still continue communicating information to the public on all important subjects, but then you shall not take away from the party who is injured his right of action, and the damages shall be paid to him out of the public purse.—On the same principle, it is said, that if you take a piece of land for a railway or any public purpose, compensation is to be made to the owner.

Sir R. Inglis's plan, that party aggrieved should be recompensed out of public purse in an action for damages.

Why, my Lords, this would equally apply to all confidential communications,—to all prosecutions where the party is acquitted,—and to every case where there is *damnum absque injuria*. But see to what consequences it will necessarily lead, if actions are to be brought against the Speaker as President of the House of Commons, and the damages to be paid out of the public purse. My Lords, I think it is rather probable, that in such actions inflammatory speeches would be made for the plaintiff, and exorbitant damages would be given by the Jury. We should then not have one Stockdale but many, who would all bring actions against the Speaker, in the hopes of repairing their fortunes. But what becomes of criminal proceedings? Setting Privilege aside, the Speaker is liable to indictment as well as action. He cannot be indemnified against that peril during his occupancy of the Chair, or when he has ceased to be Speaker; if he were indemnified from his pecuniary losses, he could not be so against his personal sufferings. This plan, therefore, I use the freedom of dismissing without further observations.

The next objection made, is one which has been very much relied upon, and is made the chief foundation of the ingenious argument of my Learned Friend Mr. Pemberton, questioning this Privilege,—the recent origin

7th Objection.  
That all privileges must be by pre-



scription, and that the one in question is of recent origin.

of this power. All Privilege, it is said, must be supported by prescription, and you must carry back your instances as far as the time of Richard I., when he mounted the throne or when he returned from the Holy Land.

If this rule were really and strictly applied, it would deprive the House of Commons of all its Privileges; for it certainly did not exist as a separate branch of the Legislature beyond the time of legal memory. It is since the reign of Richard the First that the House of Commons has had a separate existence; it must therefore be absurd to call for proof of instances going back so far, in order to establish the existence of any Privilege.

Apply the rule to courts of law. Jurisdiction of courts of common law from time to time extended by fictions, the origin of which can be shown.

My Lords, if this rule were applied even to Courts of Justice, what would be the consequence? The equitable jurisdiction of the holder of the Great Seal of England arose in comparatively modern times. What is to be said of the jurisdiction of this Court? By the Uniformity of Process Act, your Lordships now have it, directly under the authority of the Legislature. But

before that your jurisdiction and that of the Common Pleas mainly rested upon a fiction, not older than the reign of Charles II., when *ac etiams* and *nec nons* were introduced to increase the business of the Courts—or rather to swell the emoluments of the Judges and officers.

Writs of Error to Parliament, from the Courts of Common Law, are very ancient; but what would become of the jurisdiction of the House of Lords on appeals from Courts of Equity? For Lord Hale

Equitable jurisdiction of House of Lords cannot be traced farther than the reign of Jas. I.

says, no instance of any such appeal can be carried back further than the reign of James I. But still that privilege the House of Lords has asserted, and asserted with success.

Power of court of oyer and terminer to prohibit publication of proceedings. *Rex v. Clement.* 4B. & Ald. 218; 1 & 2 Geo. 4, A. D. 1821.

My Lords, I can give an instance of a power which has been decided to belong to courts of justice, and for which no precedent goes higher than the present century. The power of a Court of oyer and terminer to prohibit the publication of their proceedings

First exercised on  
impeachment of  
Lord Melville,  
A. D. 1806.

during a trial was established in the *King v. Clement*. The earliest instance of that power being exercised by any Court, was in the year 1806, during the impeachment of Lord Melville. But although in specie that was recent, it rested on an ancient principle, as old as the common law of England; namely, that a court of justice may do whatever is necessary to forward the pure administration of justice. It being thought necessary, for the pure administration of justice, where several men were under trial, and their trials were taken *seriatim*, that the publication of one trial should not go forth till all were concluded,—it was held that the order was legal; it was enforced,—and the person who violated it was subjected to punishment. Now, as to the power of a Court of oyer and terminer to make such regulations, instead of showing that it was exercised in the reign of Richard I., it could not be shown to have originated until the conclusion of the reign of George III.

Power of commit-  
ment by H. C.  
cannot be traced  
farther than the  
reign of Elizabeth.

So, my Lords, the power of commitment by the House of Commons must always have existed; but we cannot bring evidence of it further back than the time of Elizabeth. The right of the House of Commons to decide the controverted elections of its own members was not settled till towards the end of the Seventeenth century, and after a long struggle with the crown.

The power to dis-  
charge Members  
confined for debt  
without Writ of  
Privilege, of re-  
cent origin.  
Recognised in  
Colonel Pitt's  
case, 2 Strange,  
985, 7 Geo. 2,  
A. D. 1733.  
Privilege of print-  
ing for use of  
Members only  
dates from 1641.

The power of the House to discharge Members of the House confined under civil process for debt without a Writ of Privilege is of very recent origin; but it is now recognized; and in Colonel Pitt's case it was solemnly decided by all the Judges that a Writ of Privilege was unnecessary.

The privilege conceded to me of printing criminal papers for the use of the Members, cannot be carried further back than the year 1641. Therefore, my Lords, "recent origin" can here be no objection.

But, my Lords, there is no difficulty at all in reconciling this Privilege with the doctrine of legal memory. I say that

Mode of publication within time of legal memory.

though the mode of publication by printing neither is nor can be immemorial (because the invention of printing itself is within the time of legal memory).—immemorially Parliament did possess the power of publishing to the community what it thought essential to the interests of the community to be published. In former times, the mode adopted was proclamation at the County Court: when printing was invented, that great resource was called into operation; but still it was on the same principle, that the House may publish that which the public ought to know.

As to former publication of Acts of Parliament. Com. Dig. Parl. (G.) 23, citing 4 Inst. 26; Ha. Parl. 36.

My Lords, I find it stated by C. B. Comyn, that “before the invention of printing, the usage was, after the conclusion of a Parliament to transcribe all the Acts in Parliament, and by a writ to every Sheriff of the kingdom, command that he should cause to be publicly proclaimed and firmly kept, all the statutes and all the articles contained in them, in all the places in his bailiwick which he should see expedient;” and “that the sheriff thereupon proclaimed them in his county court, where a transcript was preserved that every one might read it or take a copy of it.” But he also says, “proclamation by the sheriff is not necessary, for every one ought to take notice of everything done in Parliament; and since printing has been used, the proclamation has been disused.” So Blackstone speaking of the publication of Acts of Parliament says, “the usage was for the Sheriff to proclaim them at his County Court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the Seventh.”

1 B. Com. 185.

Other means of publication might be employed.

Printing, therefore, comes merely in place of a former mode of publication, which is now superseded by one more effective. And, my Lords, if, in consequence of discoveries in science, there should be another mode of publication or communication more effective and more rapid and more economical than printing, if there should be an electric telegraph constructed capable of instantaneously communicating

its information to the remotest parts of the kingdom, and at some future time this new mode should be resorted to for the purpose of making public the proceedings of either House of Parliament, I should not say that this was any usurpation of new power, but that it was only acting upon a long established principle which never had been questioned.

My Lords, I have now to say a word upon the hacknied topic of abuse. It is said, "Shall the House of Commons be allowed, with impunity, to libel all or any of her Majesty's subjects?" Is this a fair mode of putting the question? You assume the abuse, and then from the abuse assumed, you deny the right. My Lords, try this mode of canvassing any of the most unquestioned powers that belong to any of the Courts of Justice in Westminster Hall. This Court has a power of commitment for contempt, and a party so committed for contempt can have no *habeas corpus* and no remedy by action. Well then, according to the mode of disproving a power by its abuse, it may be said, "What! shall the Judges have a power, according to their caprice, in an arbitrary manner, or from some corrupt motive, to immure for seven years in a gaol a man who is perfectly innocent?" This, my Lords, would be merely a description of your power of committing for contempt, which does belong to you, and necessarily must, for the due administration of justice. This power is not only liable to abuse, but has been abused,—as in the well known case, where a Lord Chancellor being told that an attorney boasted of having made him Chancellor by patronising him at the bar, said, "Then I will lay my maker by the heels," and committed the poor attorney to the Fleet. For a contempt of no very aggravated nature the Court of Common Pleas has ordered the party not only to be imprisoned but to be set in the pillory.

My Lords, the same form of expression might be used to deprive the House of Commons of every Privilege which it possesses. The Privilege to be free from arrest, might be described as giving to the Commons the power to make the House a place of refuge for frau-

8th Objection.  
That the Privi-  
lege is liable to  
abuse.

duleut debtors. The liberty of speech might be said to give to every Member of the House of Commons the right of calumniating and vilifying his neighbour with impunity. But these Privileges do exist and must exist, or the existence of the House of Commons cannot continue to any useful purpose.

It is supposed by the Constitution, my Lords, that the Houses of Parliament will do their duty as much as our Courts of Justice, and that there is quite as little danger of usurpation of undue power by the House of Commons, as by the Court of Queen's Bench.

The theory of the constitution supposes that the Houses of Parliament will not abuse their Privileges. What instance of actual abuse of this particular Privilege? Since the Revolution only one action before this: viz. *Stockdale v. Hansard*, 7 Car. & Pay. 731. A.D. 1837. Where a plea of justification, that the alleged libel was true, was found against the plaintiff.

With regard to actual abuse, those can very little make the complaint with any plausibility who say, that an action may be brought, and might always have been brought, when anything criminal is published. Since the Revolution, my Lords, there has been one single instance of such an action being brought, and in that case—I mean the former action of *Stockdale v. Hansard*—on a plea of justification, alleging the truth of the libel, its truth was established to the entire satisfaction of the jury, and a verdict was found for the defendant. Therefore,

my Lords, those who say that such actions always might have been brought, and that the law affords this remedy to injured reputation can with very little plausibility assert, that there has been any abuse which should deprive the House of Commons of what they consider so essential for the due performance of their duty.

My Lords, it only now remains for me to examine the authorities upon this branch of the subject.

Authorities upon this branch.

*Lake v. King*,  
1 Saund. 131; 1  
Lev. 240; 1 Sid.  
214; 2 Keb. 361.  
462. 496. 659.  
801. 383. 20 C. 2  
A.D. 1667.  
Printing and distributing copies of

The first case which seems to me to be in point is *Lake v. King*, where it was held, that printing and distributing copies of a criminatory petition to the Members of a Committee was lawful, and that the Court would take notice of the usage of Parliament on which the Privilege was established. The action was in case for a libel on the plaintiff, who was a Doctor of Laws

a petition to Members of a Committee held lawful though containing criminatory matter.

and Vicar General to the Bishop of London. The libel was alleged to have been in the shape of a petition to a Committee of Parliament for grievances; the petition charged the plaintiff with many horrible and great abuses in his office, such as extortion, oppression, vexation, and other misdemeanors, and clearly was of a criminatory nature, and would have been the subject of an action for libel, unless it had been a privileged publication. The question was, whether the printing and publishing it in the manner stated were justifiable or not? Chief Justice Kelynge, as might have been expected, was strongly of opinion that this was an unjustifiable publication. That Chief Justice presided in this Court when the question was first argued, and it is stated, "of such opinion, namely, that it was an unjustifiable publication, Kelynge, Chief Justice in his lifetime seemed to be strongly:" He had taken up

1 Saund. p. 132

a very strong impression against allowing this as a Privilege of Parliament,—no doubt saying fine things about the value of character and the encroachments of power. He was prepared to decide against the existence of such a Privilege; and, had he survived, he would have done so,—perhaps with temporary applause, for supporting the rights of the subject against the House of Commons. But it fortunately happened that before the case was determined, he was succeeded by that profound lawyer and constitutional Judge, Lord Chief Justice Hale, who, with the assent of Twisden, Rainsford, and his brethren, held the action could not be maintained. It is stated that the defendant principally insisted on the order and course of proceedings in Parliament, which allow of the printing and delivering of petitions and cases depending in Parliament, or before any Committee thereof, and as Coleman, a Member of Parliament, said at the Bar, that "when it was a question in the House

p. 133.

of Commons whether it should be allowed to print and deliver copies of petitions and cases to Members of Parliament, it was resolved in the affirmative that it should be so allowed. And of the order of proceedings in Parliament and their Committees, the Court will take judicial notice."

Such is the statement of Saunders, one of the most accurate of reporters.

Now in that case there was no order of the House for publication ; but it appeared to the Court that as the Act complained of was according to the order and practice of the House of Commons, it was justifiable. There it was unnecessary to go further than to decide that the petition might be lawfully printed and distributed among the Members of the Committee, for the distribution was confined to Members of the Committee. But on the same principle on which that case was decided, namely, the order and practice of Parliament,—when I have brought to your Lordships' notice that it is according to the order and practice of Parliament that papers should be printed and published by the authority of the House, and not confined to the use of Members, we are entitled to your Lordships' judgment, and the more extended Privilege will be recognized and established.

The next case on which I rely is the *King v. Williams*, into which I will not again enter, but which I say—looking to the Bill of Rights, by the 9th article of which that prosecution was condemned, and I may say reversed—is to be considered an authority in my favour. It is disclaimed by Mr. Curwood, but I rely upon it. That the ninth article in the Bill of Rights refers to the prosecution against Sir William Williams, no doubt can be entertained. The alteration in this by the Lords, your Lordships may recollect ; the Resolution proposed by the Commons was against prosecutions that had been commenced and prosecuted during the reign of James the Second, contrary to the liberty of the subject ; it turned out upon the investigation of the Lords, that this prosecution had not been commenced in the reign of James II, but in the reign of Charles II ; the Lords disagreed to the Resolution in its original form ; in its amended form, in which it was said that prosecutions had been improperly carried on

*Rex. v. Williams,*  
13 Sta. Tri.  
1369.  
2 Show, 471 ;  
Comb. 18.  
2 Jas. 2. A.D.  
1608.

Prosecution of  
Speaker for pub-  
lishing a crimin-  
atory paper by  
order of the House  
declared illegal  
by Bill of Rights.  
1 W. & M. A.D.  
1689.

13 St. Tr. 1371,  
note Com. Journ.  
Feb. 8, 11, 12.  
A.D. 1688-9.

during the reign of James II, they concurred, and that had the assent of all three branches of the Legislature, and now stands on the statute book as part of the law of the land.

My Lords, I am favoured with a manuscript in the handwriting of Sir William Williams, for the purpose of showing that the Bill of Rights did refer to his case; it is not perhaps very necessary; for the very fact of that alteration in the Lords, and of Sir William Williams being named as a Member on the Committee of the House of Commons to frame the Resolution would be quite enough;—but I find this in his own handwriting:—“The part of the Bill of Rights relating to my judgment in *Banco Regis*, and fine in Trinity, 1st James II., for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal causes.”

MS. of Sir William Williams, showing that the 9th art. of the Bill of Rights referred to his case.

Upon a copy of the 9th article.

A prosecution, therefore, for anything done, or for any publication by the authority of the House of Commons, is condemned by the Legislature; and if no such prosecution can be brought, it follows as a necessary consequence that no action can be brought, and that such publications must be considered as legitimate. My Lords it has been considered by all who have written on that subject, from the Convention Parliament down to the present time, that the Bill of Rights does refer to the prosecution against the Speaker, and has the effect of declaring what the law always has been and is, that a publication by the authority of the House of Commons cannot be treated as a libel.

I will next, my Lords, refer to the *King v. Wright*, and notwithstanding the observation of my Friend Mr. Curwood upon Lord Kenyon, I must look with great respect on that which falls from him. I do not think if he had any partial feeling that it was at all in favour of popular privileges, or that he had any inclination extend to the power of the popular branch of the Legislature.

*Rex v. Wright*,  
8 T. R. 293.  
39 Geo. 3. A.D.  
1799.

That being an application to the Court for leave to file a criminal information for the re-publication of a Report of a



Criminal information refused for re-publishing copy of Report of Secret Committee of H. C. containing criminatory matter on an individual.  
p. 294.

Secret Committee of the House of Commons, containing an alleged libel on Mr. Horne Tooke, it was urged by Mr. Erskine and Mr. Warren, in support of the rule, that the House of Commons was not justified in directing or giving a sanction to the publication of the libel on Mr. Tooke; or at all events, it had no legal authority to direct or sanction the publication of matter that amounted to a libel on any individual, beyond an entry in its own journals, or for the use of the Members of the House. And that even if it possessed such an extraordinary power, the House having in that instance only directed an entry in its own journals, and ordered the printing (by its own printer) of as many copies of this Report as were sufficient for the use of the Members of the House, that did not give the defendant, a stranger, the right of printing and circulating copies of it, so as to furnish him with a legal defence either to an action for damages, or to an information or indictment. They therefore took the same ground as that taken by my friend Mr. Curwood.

Lord C. J. Kenyon's judgment.  
p. 296.

My Lord Kenyon says, "This is an application for leave to file a criminal information against the defendant for publishing a libel; so that the application supposes that this publication is a libel. But the inquiry made by the House of Commons was an inquisition taken by one branch of the Legislature to enable them to proceed further, and to adopt some regulations for the better government of the country; this report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceedings of either of the Houses of Parliament is a libel—and yet that is to be taken as the foundation of this application. The

Rex v. Williams, commented on by Lord Kenyon, C. J.

case of the King v. Sir W. Williams, which was principally relied upon, happened in the worst of times; but that has no relation to the present case;" Then he reprobates the decision, and goes on to say,

“This is a proceeding by one branch of the Legislature, and therefore we cannot inquire into it.” “The Report in question being adopted by the House at large, is a proceeding of those who, by the constitution, are the guardians of the liberties of the subject: and we cannot say, that any part of that proceeding is a libel. I am therefore clearly of opinion that this rule ought to be discharged.”

Mr. Justice Grose. “This is a motion for leave to file a criminal information for publishing a supposed libel,  
Grose, J. but in truth for publishing a proceeding of one branch of the Legislature when they were acting for the safety of the State. Now, on looking into the judicial proceedings of this Court, I find no instance of such an information as the present. The case of the King and Sir W. Williams is most like this case; but it must be remembered that that was declared by a great authority to be a disgrace to the country.”

Mr. Justice Lawrence likens the case to the publication of proceedings in courts of justice; and he says, “Though  
Lawrence, J. the publication of such proceedings may be to the  
p. 297. disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known. The general advantage to the country in having those proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of those proceedings. The same reasons also apply to the proceedings in Parliament; it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated, and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller. Though, therefore, the defendant was not authorized by the House of Commons to publish the Report in question, yet as he only published a true copy of it, I am opinion that the rule ought to be discharged;” and the rule was discharged accordingly.

Now that case goes much further than the present, for there it was held that a republication by a stranger, without the authority

of the House of Commons, was legal, and here I only call upon your Lordships to decide that, as against officers of a House of Parliament specially appointed to publish one of its proceedings, you cannot treat that publication as criminal.

Rex v. Clement,  
4 B. & Ald. 218,  
1 and 2 Geo. 4,  
A. D. 1821.

Court of oyer and  
terminer have  
right to forbid  
publication of  
proceedings be-  
fore them. MS.  
Mr. Gurney's  
short-hand notes.

The next case to which I would draw your attention is Clement's case, which I have before alluded to on another point. On Monday the 17th April, 1820, Arthur Thistlewood was put upon his trial at the Old Bailey, upon an indictment for high treason, and Lord Chief Justice Abbott then being one of the Justices by whom Thistlewood was tried, before the commencement of the trial stated publicly, that as there were several persons charged with the offence of high treason by the same indictment, whose trials were likely to be taken one after another, he thought it necessary strictly to prohibit the publishing of any proceedings of that or any other day until the whole trial should be brought to a conclusion, and that it was expected that all persons would attend to that admonition. The trial of Thistlewood was concluded on Wednesday evening, and James Ings was afterwards tried for and convicted of the same offence on the Saturday following. Then on the Sunday morning, a full and fair account of both trials was published in the Observer newspaper, of which Mr. Clement was the proprietor. He was summoned to attend before the Court of oyer and terminer at the Old Bailey, and there he was ordered to pay 500*l.* for violating that order, which had been promulgated by Lord Tenterden. A rule *nisi* was moved for in the Court of King's Bench for a *certiorari* to remove the order, for the purpose of having it quashed. It turned out that a similar order had been made by the Court of King's Bench in 1817, on the trial of Watson for high treason, and at the Special Commission for Derby in 1817; the earliest instance that could be found of any such prohibition was in the year 1806, by the House of Lords, on the trial of Lord Melville. The rule to show cause was discharged, on the ground that the Court of oyer and terminer had authority to make the order prohibiting the publication, and to im-

pose a fine for the contempt. I cite this case, my Lords, for the purpose of showing that the House of Commons is now claiming to itself no greater power than is exercised by inferior Courts, and that for the purpose for which those Courts are instituted, they are authorized either to prohibit or to order the publication of their proceedings. I am now giving your Lordships an instance where they lawfully prohibited the publication of their proceedings. I will, by and by, give your Lordships instances where they have ordered the publication of their proceedings, and the validity of that order has been recognized.

It having been held in this Court that the prohibitory order was legal, and the rule for the *certiorari* being discharged, the fine was estreated into the Court of Exchequer; the fine belonged to the King in right of the Duchy of Lancaster; the estreat roll went under the seal of the Exchequer into the Duchy Court; by an order of the Duchy Court in 1822 a *levari facias* issued in 1823, under the seal of that Court, directed to the sheriff of Middlesex, returnable on the 6th of November following, under which the sheriff levied the 500*l.*, and paid the money to the registrar of the green wax, for his Majesty's use. On the 3rd of May, 1824, an order was made by the Duchy Court, on a motion by counsel for the claimant, and consent being given on behalf of his Majesty, that the defendant should be at liberty to file a plea to the estreat, alleging that the order by the Justices at the Old Bailey was made without lawful authority and jurisdiction, and contrary to the law of the land,—praying to be discharged from the fine. This leave being given, so as solemnly to try the power of the Justices at the Old Bailey to make that order, the plea was filed; there was a demurrer by the Attorney-general, and a joinder in demurrer. It came on to be argued the 17th April, 1828. The hearing was before the Chancellor of the Duchy, assisted by Mr. Justice Bayley, and Mr. Baron Hullock. After having heard the case most ably argued by Lord Brougham, then at the bar, who brought forward on that occasion in defence of his client the zeal and eloquence and learning he always displayed, it was de-

Further proceedings in Clement's case.

cided, my Lords, by Mr. Justice Bayley, and Mr. Baron Hullock, that this order was perfectly justifiable,—and upon this ground,—that every Court of justice has a right to make such orders as are necessary for the pure administration of the law; that by disobedience to that order a contempt of the jurisdiction of that Court had been incurred; and that the fine had been lawfully imposed, and had been lawfully levied. All relief was therefore refused.

This case, I conceive, is very important, as showing that a Court has a right to forbid the publication of any of its proceedings, if it be of opinion that the publication of those proceedings may be detrimental to the due exercise of its functions. *Pari ratione* it has a right to order the publication of any of its proceedings, if it be of opinion that the publication of those proceedings will conduce to the ends of justice. Courts sit for the administration of the law; if they think the administration of the law will be benefitted by publication, they have a right to order publication. The House of Commons sits to assist in making laws, and to inquire into abuses, and if the House of Commons thinks that the publication of its proceedings will better enable it to perform its duty of legislating or inquiring, then, *pari ratione*, it has an equal right to order such publication.

Judgment of Bayley, J., in Clement's case, in the Chancery of the Duchy of Lancaster.

I will read to your Lordships what is said by Mr. Justice Bayley, on this subject, in giving judgment in Clement's case: "I take it to be incident to a Court to have a power to regulate its own proceedings, and whenever it sees that a particular course is in its judgment necessary for the purposes of justice, that it may prescribe that course, and may issue an order which shall be binding upon the public at large, and upon every individual in the kingdom, to take care that that course is pursued, and that there is no violation of that course; and it is for the Court to judge of the expediency or non-expediency of any particular rule which that Court may pronounce."

He is followed by Mr. Baron Hullock, who thus expresses himself: "The question is, whether a Court of Record

of oyer and terminer and gaol delivery has or not a right to make an order calculated in their judgment to further the ends of justice, in a particular proceeding then pending before them; that is the only question in this case with respect to the order.” \* \* \* “It is said, that those cases which

have been cited to show, that Courts of law have exercised a similar jurisdiction, are recent. It is true they are; but they show the general understanding of the Court, by which those respective orders have been made upon the subject; and it may be that modern experience has shown more than formerly the necessity of this species of intervention in cases of this sort.” \* \* \* “If the Court had the power to do that, and after the opinions that were delivered on this subject in so many different Courts (which comprehend, I think, putting them all together, all the judicial characters at that time and the present), I think it may fairly be inferred that that power exists; I forbear to examine into the expediency of this order upon that occasion. If the Court possessed the power to issue an order of this sort, it is for them, and for them exclusively, to consider the nature, the terms, and the extent of that order.”<sup>(a)</sup>

Now, my Lords, what is the principle there established?—That a court of justice has a right to lay down such orders as it feels to be necessary for the due administration of justice; that is, for the due performance of its functions. The House of Commons requires no more than that it should be allowed to have a corresponding power to publish that which it feels necessary for the due performance of its functions.

I have given your Lordships an instance of the exercise of this power by a court of justice, in the case of a publication being forbidden; I will now give an instance of a publication being or-

(a) There seems no reason to doubt the power of the Judges to prohibit publication under such circumstances till the conclusion of all the trials; but I must own I think there is great weight in the argument, that the immediate publication only enlarges the Court, and admits the whole nation to be present. At the trials for high treason at Monmouth, in January, 1840, which I conducted as Attorney-general, I did not pray any such order, the proceedings were published daily in all the London newspapers, and I am not aware of any inconvenience experienced from this course.

Layer's case, 16  
How. 8t. Tr. 93;  
9 G. 1, A. D. 1722  
Judges ordered  
the publication of  
a trial for high  
treason, 8 vol.  
Parl. Hist. 54;  
proceedings in  
House of Lords  
on the subject.

dered. Layer was tried for treason at the bar of this Court, in the year 1722. The facts are not material for this purpose, but I must claim your Lordships' attention to the proceedings which took place subsequently with regard to the publication of the trial. There was a great complaint made in the House of Lords, that this trial had not been published, and a

noble Lord moved, that the Judges of the King's Bench be ordered to cause the trial of Christopher Layer, esq. to be forthwith printed and published, the same being first perused by the King's counsel. This motion was backed by the Earls Cowper, Strafford, Aylesford and others, who urged, "that there had been an extraordinary, and, in their opinion, an unnecessary delay in the printing and publishing the said trial, it being two months since Mr. Layer was tried, directions having been given to Samuel Buckley for the speedy publishing of his trial, so long since as the 27th of November last, as appeared by an advertisement, printed by authority in the *Gazette*."

The Lord Carteret zaid, "that the order moved for was altogether unnecessary, directions having long before been given by the Judges of the Court of King's Bench for the printing and publishing of the said trial with all convenient speed; that the said trial being of very large extent, and several parts of it that were taken down in short-hand, requiring a great deal of time to be put in order and revised and rectified by the Judges and the counsel on both sides, had occasioned the delay complained of; but that the printing of the said trial being now in great forwardness, the same would be published in a few days."

The motion was negatived; but there was a protest which was signed by various Peers in defence of the motion. It appeared, my Lords, that this Court, in the course of Layer's trial, instead of prohibiting the publication, had ordered it to take place; it was, therefore, thought unnecessary for the House of Lords to interfere. The motion, as I have said, was lost, on a division. But suppose the motion, being supported by many Peers of great name and of great

constitutional learning, had been carried, and the Lords had ordered the trial to be published, could your Lordships afterwards have held, that what the Lords ordered to be published was a libel, or the subject of an action? Your Lordships' predecessors had ordered the publication of this very trial of L<sup>ay</sup>er; and shall it be said, that what they ordered for the due administration of justice would be considered any where as a libel? This is an instance of the Court of King's Bench having ordered the publication, and in Clement's case you have an instance of a court of criminal jurisdiction forbidding the publication to take place. If in the case of an impeachment, the House of Commons had prepared articles of impeachment, and printed and published evidence in order that such evidence should go forth to the community, it is impossible to say, that such a publication could be treated as a libel, any more than the account of a trial ordered to be published by the House of Lords.

I will refer your Lordships to another instance of a publication being ordered by a court of justice. *Gurney v. Longman*, 13 Ves. 493. A.D. 1806-7; *Ld. Melville's trial* ordered to be published by House of Lords. Longman was a bill for an injunction against publishing an account of Lord Melville's trial; at the conclusion of the trial there was a resolution by the Lords, that the Lord Chancellor should give orders for printing and publishing the trial of Lord Melville, and the several questions put to the Judges and their answers, and that no other person should presume to publish the same. The Lord Chancellor appointed the plaintiff to print and publish the whole proceedings in the House of Peers upon the impeachment, and forbade any other person to print and publish the same. There had been another account of the trial published by Longman, and this was a suit instituted by Mr. Gurney to obtain an injunction against that publication. The injunction was granted. The usage in the House of Lords, of printing particular trials of particular persons, by parties whom the Lord Chancellor appointed, was shown to have existed, I may say, immemorially. The same thing was done in 1717, on the trial of Dr. Sacheverel; again in 1746, on the trial of Lord

*Gurney v. Longman*, 13 Ves. 493. A.D. 1806-7; *Ld. Melville's trial* ordered to be published by House of Lords.

Same order as to trial of Dr. Sacheverel, in 1717; of Lord Lovat, in



1746; of Lord Ferrers, in 1760; of Lord Byron, in 1763, and of the Duchess of Kingston, in 1776.

Lovat; in 1760, on the trial of Lord Ferrers; in 1763, on the trial of Lord Byron; and in 1776, on the trial of the Duchess of Kingston. <sup>(a)</sup>

Now these are instances of trials before the Lord High Steward, without the intervention of the House of Commons; as well as of trials before the House of Lords, on impeachment by the Commons; and in all of them, the House of Lords, thinking it would tend to the due administration of justice, ordered the publication of their proceedings. There can be no doubt, my Lords, that there were in those trials many things highly criminatory of others besides the individuals who were tried and convicted or acquitted; but no one ever thought of bringing an action against the printer employed by the House of Lords; and it is impossible to say such action could be sustained. As little could the publication under the authority of the Court be complained of as Mr. Clement could complain of that order by which publication was forbidden. If the House of Lords thought fit to forbid the publication, then publication against its order would have been a contempt of that House, and would have subjected the party to punishment. In the same manner, publication by their authority exempts from punishment any person who acts under that authority.

There is another case to the same effect, *Manley v. Owen*, mentioned in the famous case of *Millar v. Taylor*. “A

*Manley v. Owen*, cited 4 Bur. 2329, 29 G. 2, A.D. 1755. Lord Mayor's power to order publication of sessions paper.

bill was filed by some printers (who had bought from the Lord Mayor a copy of the Sessions paper) to enjoin the defendant from printing it. The Lord Chancellor went fully into it; and upon the affidavits of the purchase and authority from the Lord Mayor,

it was shown, that it had always been usual for the Lord Mayor (being first in the commission) to appoint the printer of the trials, and to take a consideration for it. The Lord Chancellor thought the right to print gave the plaintiff the property; and granted an injunction: which was acquiesced under.”

(a) A similar order was made on the recent trial of Lord Cardigan in 1841.

Here, my Lords, is a court of *oyer* and *terminer* at the Old Bailey, ordering the Sessions paper to be published from day to day. If such an order had been illegal, it could not have been recognised in a Court of Equity; it would have been no foundation of property; it would not have been a ground for an injunction. But Lord Hardwick held, that the act of the defendant was an invasion of property, and that the order of the Lord Mayor was lawful. This seems to show, that Courts of Justice have the power of ordering publication of their proceedings; and indeed we frequently see in the title-page of the old reports, that they are "published by license," or, "by the authority of the Judges of the Court."

Even the sentence of a court-martial may be ordered to be published; it may be read at the head of every regiment, and entered in the orderly book of every regiment; and could it be said, that a court-martial having ordered their sentence to be so read and entered, this being a publication of its proceedings necessary for the due administration of martial law, it could be treated as a libel?

I will now, my Lords, shortly refer you to cases in which it has been held, that publications which are necessary for the good of the community are to be considered as privileged, and cannot be made the foundation of any legal proceedings. There is the case of *Jekyll and Moore*, in which it was held, that "if a court-martial, after stating in their sentence the acquittal of an officer, against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court-martial is not liable to an action for a libel for having delivered such sentence and declaration to the Judge Advocate."

Evidence of a court-martial may be ordered to be published.

Cases where communication held to be privileged, though obnoxious to individuals.  
*Jekyll v. Moore*, 2 N. R. 341, 47 G. 3, A.D. 1806. Entry by court-martial impeaching conduct of prosecutor.

The case of *Home v. Lord W. Bentinck* was an action for libel. The Duke of York, the Commander-in-Chief, had or-

**Home v. Ld. Bantick, 2 Bro. & Bing. 180. 4 Moo. 563. 1 G. 4, A.D. 1820.**  
Report by court of inquiry to commander-in-chief.

dered a court of inquiry on an officer in the army, and the defendant was president of that court of inquiry. This was not a regular tribunal recognized by the law, but a mere court of inquiry, by whom a report was made to the Horse Guards ;—and that report was held to be a privileged communication. All

the judges thought that the report was properly rejected at the trial, and that no copy of it ought to have been received in evidence. The plaintiff was ready to have proved a copy of that report, but it was held that neither should the original be produced nor a copy received, although this was merely a report of a court of inquiry, and not of any court of justice, established either by common law or statute.

I may remind your Lordships of a case mentioned in the books,

**Greenwood v. Priest. Cro. Jac. 90; 13 St. Tr. 1387; Atk. Pow. Parl. 19.** Statement made by clergyman from Fox's Book of Martyrs.

where a clergyman in his sermon from the pulpit told a story from Fox's Martyrs, in which he denounced an individual as guilty of perjury, and said that he had died in a melancholy manner by the visitation of Heaven, as a punishment for his crime.

It turned out that the very individual alluded to was one of his congregation then present, and heard it, and afterwards brought his action against the parson. Did the action lie? It was shown by the defendant that he took this story from a religious book ; the jury believed that what he did he sincerely did in the discharge of his duty ; and though the plaintiff had been denounced as having been put to death by Heaven for the crime of perjury, and though this charge was made in his own hearing, there was a verdict against him.

I may mention the case of *Cutler v. Dixon*, in which it was

**Cutler v. Dixon, 4 Rep. 14 b. 27 & 28 Eliz. A. D. 1585.**  
Articles of the peace containing false charges.

held that no action would lie for articles of the peace, " containing great abuses and misdemeanors, not only concerning the petitioner, but many others ;" and the Court said, " if actions should be permitted in such cases, those who have just cause of com-

plaint would not dare to complain for fear of infinite vexation."

I may mention the case of *Astley and Young*, in which it was held an action would not lie for libellous words in affidavits used in courts of justice. Lord Mansfield there recognized the case of *Lake and King*, and expressed a clear opinion on the principle established in that case, that no such action could be maintained.

*Astley v. Young*,  
2 Burr. 807,  
33 Geo. 2, 1759.  
Affidavits con-  
taining crimina-  
tory matter.

I may also mention the case of *Cleaver v. Sarraude*, recognized by Mr. Justice Holroyd, in *Freeman and Ives*, in which it was expressly held no action was maintainable for matters contained in written communications made *bond fide* to a friend, not for the purpose of slander.—

*Cleaver v. Sar-  
raude*.  
cited 1 Camp. 268.  
Recognized by  
Holroyd, J.

*Bond fide* com-  
munication to  
friend.  
*Freeman and  
Ives*, 5 B. & A.  
642, A. D. 1822.  
Petition *bond fide*  
addressed to Se-  
cretary at War  
derogatory to cha-  
racter of an  
officer.

In that case of *Freeman and Ives* it was held, that a petition addressed by the creditors of an officer of the army to the Secretary at War, *bond fide*, and with a view of obtaining through his interference the payment of a debt due, and containing a statement of facts which were derogatory to the officer's character, but which the creditor believed to be true, is not a libel for which an action is maintainable, though the Secretary at War was not a judge, and though by law he had no jurisdiction over the matter, and had no right to stop the pay of the officer.

I may refer your Lordships to Captain Baillie's case, in which Mr. Erskine made his celebrated speech when first called to the bar. There had been distributed among the governors of Greenwich Hospital a statement containing the most serious charges against various individuals connected with the management of the hospital. An application was made for a criminal information, and a rule to show cause was granted; the rule was discharged, and with costs, for this reason, that the parties had an interest in the matter that was published; and therefore the publication was lawful.—Apply that to the case at bar. Here is a publication respecting the regulation of gaols, in which the public, to whom the communi-

*Capt. Baillie's case*.  
1 How. St. Tr. 10,  
18 Geo. 3,  
A. D. 1778. State-  
ment distributed  
among Governors  
of Greenwich  
Hospital, contain-  
ing charges  
against indivi-  
duals connected  
with the hospital.

cation was made, had the deepest interest ; this is a communication by the House of Commons to the constituency of the United Kingdom. It is part of a discussion of the Commons of the United Kingdom, *inter se*, on a subject in which they are interested, and rests on the same principle.

In the case of *Lord Beauchamp v. Sir Richard Croft*, Sir Richard had sued out a writ of *forger of false deeds* against Lord Beauchamp, whereupon his Lordship brought an action of *scan. mag.* against Sir Richard. “The defendant justified the said slander by the user of the said writ. And by the better opinion on demurrer to the plea, the matter of justification is good, and out of the intention of the law and statutes for slander, &c., for no punishment was ever appointed for a suit in law, however it be false and for vexation.”

*Beauchamp v. Croft.*  
Dyer, 285.  
11 Eliz. A. D. 1568. Writ of forger against a peer, charging him with forging deeds.

To the same effect is *Buckley v. Wood*, where Wood had exhibited a slanderous bill against Sir R. Buckley in the Star Chamber, charging him with being a maintainer of pirates and murderers, and a procurer of murders and piracies ; and Sir R. Buckley brought an action on the case against Wood for the slanderous words contained in the bill, and for having said that the matters contained therein were true ; judgment was given for the plaintiff, on the ground that the offences charged were not cognizable in the Star Chamber ; but it was also “resolved, *per totam curiam*, that for any matter contained in the bill that was examinable in the said Court no action lies, although the matter is merely false, because it was in a court of justice.”

*Buckley v. Wood,*  
4 Coke Rep. 14 b.  
33 & 34 Eliz.  
A. D. 1594.  
For matter contained in a bill presented to the Star Chamber, though the allegation were false, if the subject-matter within the jurisdiction of the Court no action.

I may likewise refer you to the case of *Delany v. Jones*, where there being an action for a libellous advertisement in a newspaper, which inferred that the plaintiff had committed a burglary, Lord Ellenborough said, “The plaintiff’s counsel contend that you are to take into your consideration only whether the adver-

*Delany v. Jones,*  
4 Esp, 191,  
A. D. 1802.  
Advertisement imputing burglary to plaintiff.

tisement conveys a libellous charge against the plaintiff or not. I am of a different opinion. I conceive the law to be, that though

p-192. that which is spoken or written may be injurious to the character of the party, yet, if done *bonâ fide*, as with a view of investigating a fact, and which the party making it is interested in, it is not libellous." It is not pretended that in the publication complained of by Mr. Stockdale there is anything like *mala fides*, anything beyond the investigation of a subject in which the public is deeply interested.

My Lords, I will finally on this head cite the case of *Blackburn v. Blackburn*, in which though it appeared there was express malice, and the action was therefore maintainable, still this doctrine is to be found, that a communication to a dissenting congregation respecting the character of a person to be appointed minister, is *primâ facie* protected, and that the plaintiff is bound to show that it was done maliciously. If there may be a communication to a dissenting congregation on the character of a person to be appointed minister of that congregation, may there not be a communication to the public respecting the state of the principal gaol in the metropolis?

*Blackburn v. Blackburn.* 4 Bing, 395; 1 Moo. & Payne, 33. 63; 3 Car. & Pay, 146, A.D. 1827. Bonâ fide communication to a dissenting congregation, respecting a person to be appointed minister.

My Lords, to show that the law does not always give an action where there is a loss, I may refer you to the case of *Stockdale v. Onwhyn*, where Mr. Stockdale the present plaintiff, incurred great loss by the piracy of a work he published, called the memoirs of Harriette Wilson; but it turned out that this was an indecent publication, containing the history of the amours of a courtesan, and it was held that no action could be maintained for such piracy.

Action does not always lie where there has been loss. *Stockdale v. Onwhyn.* 2 Car & Pay, 163, A.D. 1826; as in case of piracy of obscene work.

Again, the printer of that work found that it does not at all follow that where there is a loss an action can be maintained; for he lost his paper and printing when he printed that work, the *Memoirs of Harriette Wilson*,

*Poplett v. Stockdale.* 2 Car. & Pay. 198, A.D. 1825;

or for printing such work. for the same Mr. Stockdale, and he found that he was without remedy. He brought an action against Mr. Stockdale to recover the price of printing the work ; the objection was made, on the part of the then defendant and now plaintiff, that no action would lie, it being an immoral publication ; and on that ground it was held the plaintiff must be nonsuited. There Mr. Serjeant Vaughan, the counsel for the plaintiff, says, “ Does your Lordship think that this objection lies in the mouth of Mr. Stockdale ? ” Lord Chief Justice Best said it did, and directed a nonsuit.

So that, in that instance, there was a loss without any recompense to the party by whom that loss was sustained. There must always be a right, and a loss concurring to give a just cause of action.

There must be a right and loss concurring to give cause of action.

Per Wilmot, C. J. in *Rex v. Almon*, Wilmot's Opinions, 243, A. D. 1765.

With regard to the required proof of the exercise of the Privilege or power claimed by the House of Commons, I would remind your Lordships of what is said, in the *King v. Almon*, by Lord Chief

Justice Wilmot. An application was made to the King's Bench for publishing a pamphlet containing a libel on the Court ; and Wilmot then a Judge of the King's Bench, and afterwards Chief Justice of

Power of Courts coeval with their institution.

the Common Pleas, says, “ The power which the Courts of Westminster Hall have of vindicating their own authority is coeval with their first foundation

and institution.” He does not at all rest upon proving instances of it ; he intimates an opinion that it does not grow up merely by prescription, but that it is inherent ; that it belonged to the Courts on their first constitution ; for without that power the Courts could not properly exercise their functions.

The same principle will be found in the important case of Beau-

*Beaumont v. Barrett*, 1 Moore, Priv. C. Rep. 59, A. D. 1836.

*mont v. Barrett*, which recently came before the Judicial Committee of the Privy Council. And I cite this case for the purpose of showing that it is not merely by prescription, or showing the exercise of the right that the Privilege must be recognized and established, but that whatever is to be considered

Same principle applied to every assembly possessing legislative authority.

as necessary for a legislative body exercising its functions, inherently belongs to it, without proof of the exercise of it, or resting it on the ground of prescription. It was there held that the power of punishing contempts is inherent in every assembly possessing supreme legislative authority, whether such as tend directly to obstruct their proceedings, or indirectly to bring their authority into contempt ; and this power being necessary for the due exercise of its functions, *pari ratione*, if the question had been whether it had the power of ordering the publication of its proceedings within the sphere of its jurisdiction, I apprehend, on the same principle, the same decision would have been pronounced ; and will your Lordships withhold from the House of Commons of the United Kingdom that power which incidentally belongs to a colonial assembly in the West Indies ?

In the judgment delivered by Mr. Baron Parke are the following  
p. 79. important observations, which I hope may outweigh

in your minds all that has been urged respecting abuse of Privilege : “ For these reasons, therefore, it appears to their Lordships that the Legislative Assembly of Jamaica had the power of imprisoning for a contempt by the publication of a libel. It may be true that they may have occasionally exercised this power of imprisonment in an improper way, as has happened in former times in the exercise of similar powers by the House of Commons in this country ; yet we may well believe that persons of the station and character who constitute the Members of such a body are not likely in these days to abuse their privileges, and that the wholesome control and influence of public opinion will prevent the revival of such evils. But, however, with that consideration we have nothing to do ; we have simply to determine what the law is.”

Now, my Lords, I have only to see whether there are any contrary  
No authorities the other way. authorities. I have looked most diligently into the books, and I can find nothing to give any countenance to the doctrine, that any publication by the authority of either House of Parliament can be made the subject of prosecution or action. I can find no such decision, I can find no *dictum* to this effect.



In the case of the King v. Lord Abingdon, it was held, and most properly, that an information would lie against a Peer for maliciously publishing in the newspapers a speech which he had made in the House of Lords, containing slanderous charges against an individual. But under what circumstances? It appears, that in his place in the House of Lords he read certain sentences from a paper which he had prepared, and which he had no doubt prepared for the very purpose of publication and calumny. Then, without any authority of the House of Lords, he published that speech; he did it for the express purpose of calumniating the prosecutor. The Chief Justice (Lord Kenyon) observed, "That with respect to the Privilege claimed by Lord Abingdon in the present case, none such existed." None such was claimed by the House of Lords. Neither House of Parliament has ever claimed or will claim a Privilege for one of its Members to publish a speech without authority, and with a view to defame. That was not a proceeding for anything done by the House or done by the authority of the House; it was the pure, spontaneous and malicious act of an individual. His Lordship continues: "That as to the words in question, had they been spoken in the House of Lords, and confined to its walls, that Court would have no jurisdiction to call his Lordship before them to answer for them as an offence; but that in the present case, the offence was the publication under his authority and sanction, and at his expense. That a Member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel." It was most properly held, that the *mens rea* of the noble Earl made him amenable to the law; he was convicted and punished.

Again, my Lords, in the case of the King v. Creevy, it was held, that a Member of the House of Commons publishing a single speech without the authority of the House, and with a view to injure an individual, could

Rex v. Lord Abingdon. 1 Esp. 226; cit. 1 Maule & Sel. 274. A.D. 1794. Information against Peer for publishing speech containing slanderous charges delivered in Parliament.

p. 228.

No Privilege was claimed by the House of Lords.

Rex v. Creevy, 1 Maule & Selw. 273; A.D. 1813.

Indictment  
against Member  
of House of Com-  
mons for similar  
offence. No Pri-  
vilege of House  
invaded.

not defend himself on the ground of Privilege. That prosecution was not for anything done by the House, or under the authority of the House; on the contrary, it was done against the authority of the

House; the House having a standing order forbidding the publication of any of its proceedings without the orders of the House. It was held, therefore, that Mr. Creevy was not exempted from his liability to an indictment, and that he was properly found guilty by a Jury. There are in the report certain observations of Lord Ellenborough which have reference merely to a publication without the authority of Parliament,—where it is the unauthorised, spontaneous, and malicious act of the individual.

p. 277.

Lord Ellenborough says, “How can this be considered as a proceeding of the Commons House of Parliament? A Member of that House has spoken what he thought material, and what he was at liberty to speak in his character as a Member of that House; so far he was privileged; but he has not stopped there, but unauthorized by the House,—(now these words of Lord Ellenborough are very material, thereby intimating an opinion, as I humbly apprehend, that if he had been authorized by the House he could not have been treated as a libeller,) —“unauthorized by the House, he has chosen to publish an account of that speech, in what he has been pleased to call a more corrected form, and in that publication has thrown out reflections injurious to the character of an individual.” His Lordship’s judgment, therefore, proceeded on the ground that it was unauthorized by the House; that it was a republication of a speech maliciously intended to injure the character of an individual, and that being unauthorized by the House, there was no privilege by which it was protected.

Stockdale v.  
Hansard.  
7 Car. & Pay.  
731 A.D. 1837.  
Lord C. J. Den-  
man’s opinion.

My Lords, there is no other authority till we come to the case of Stockdale v. Hansard, tried before Lord Denman in 1837. It is my duty to state without any scruple the circumstances under which that trial came on,—so that his Lordship and the rest of the

Court may consider what weight is to be ascribed to the opinion which was there expressed. No doubt, my Lords, the greatest respect is due to any opinion of any judge, particularly of so great a Judge as we have the happiness to see presiding in this Court : but, my Lords, I must use the freedom of saying that I think, under the peculiar circumstances of that case, his Lordship himself will think that the subject is to be regarded as *res integra*, and that his Lordship need not consider himself in the slightest degree bound by the direction which he then gave.

That like the present was an action for an alleged libel, being an extract of this very Report by the Inspectors of Gaols. There were put on the record two pleas, not guilty, and a justification of the truth of the charge, namely, that the publication referred to was an obscene book. My Lords, I knew nothing of that case until within two days of the trial ; I had not been at all consulted respecting the defence ; I had no opportunity to consider how the plea should be framed ; I had no time to prepare myself to argue the great constitutional question which it raised before my Lord Denman. There being a justification of the truth of the charge, and I being furnished with what I conceived to be incontrovertible evidence of its truth, I had anticipated that probably the other question that might be raised under the plea of *not guilty* would meet with no decision at *Nisi prius*,—that it would not be necessary that this question should call forth any opinion of his Lordship. My Lords, I say most unfeignedly,—I do not presume at all to assert that the right course was not adopted by his Lordship,—but I say with sincerity that it was not the course I anticipated ; for I should otherwise have made an effort to be better prepared. I had thought that, most probably, there being strong evidence to prove the truth of the charge, his Lordship would take the opinion of the jury on the special justification, and they, finding it established, the other question would become wholly immaterial ; or if the jury came to a different conclusion, that upon a question of such novelty and such magnitude, requiring such long and laborious research, probably the noble and

learned Judge would follow the course that is generally adopted with respect to questions of much less difficulty and much less importance arising at *Nisi prius*, by reserving it for the opinion of the Court. My Lords, if that course had been followed, this second action never would have been brought by Mr. Stockdale, and certainly one advantage would have arisen from it, that this discussion would have been unnecessary, and that your Lordships would have been spared the pain of the long argument I have had the honour to address to you. But, however that might be, what I am anxious now to impress upon your minds is, that it was then wholly impossible for me to bring before my Lord Denman the arguments and authorities which I humbly apprehend to be essentially necessary to be adduced and considered before any conclusive or satisfactory judgment could be given on such a question. His Lordship, nevertheless did,—I having little more than mooted the question and referred to the case of the *King v. Wright*,—his Lordship did very emphatically express an opinion that the order of the House of Commons would not amount to a justification. I am sure that with the candour which has ever distinguished him, his Lordship will not in the slightest degree consider himself bound by an opinion delivered under such circumstances, when I presume he could, as little as myself, or less than myself, be aware of the point to be raised under the plea of not guilty. I only knew it a few hours before; probably his Lordship did not know it till he took his seat on the bench and heard the pleadings opened by the junior counsel; indeed the pleadings would not inform his Lordship of it, and he must have remained ignorant of the subject till after the conclusion of the Plaintiff's case. I, as leading counsel for the Defendants, then stated one defence that might arise under the plea of not guilty, independently of proving the truth of the alleged libel.

My Lords, this is the only authority against which I have to struggle, and I must say, with that boldness which I hope will ever distinguish an advocate at the English bar, that under the circumstances, the *dictum* of Lord Denman is not entitled to much respect, and really has no weight at all against the mass of authorities

then unknown which might have been cited in support of the doctrine for which I now argue.

Your Lordships will bear in mind, that there being a verdict for the defendants on the special plea of justification, there was no opportunity of asking the Chief Justice to review his opinion, or of bringing the question under the consideration of the other Judges of the Court.

Report of Committee of H. C. on Printing and Publication of Papers, May 1837.

Subsequently to that trial, my Lords, there has been a deliberate investigation of the subject by competent authority ; and if your Lordships are to inquire into the existence of the Privilege, and to examine the proceedings of Parliament on this demurrer, I humbly apprehend that this Report which I hold in my hand is a document which deserves your consideration just as much as if it had been promulgated in the reign of Queen Anne, or as if it contained the decision of a Court of Law. If the Houses of Parliament are not the sole and exclusive judges of their Privileges, as I insist they are, it cannot be contended that they have not a co-ordinate and concurrent jurisdiction ; and their decisions are to be cited and examined and weighed in a Court of Law which takes upon itself to entertain the question of the existence of Privilege.

Now, my Lords, I must say, that this decision of the House of Commons, pronounced since the case of *Stockdale v. Hansard*, is entitled to very great respect at the hands of your Lordships, and must be considered as overruling that case.

My Lords, when we consider what weight is to be attached to any judgment, we look to see who were the Judges, and whether they agreed ; or, if they disagreed, what was the proportion of those who dissented. My Lords, in this case there was a Committee of the House of Commons appointed without reference to party or preconceived opinions ; and I may say that there served on that Committee men of great eminence in our profession, some of whom at first doubted, and who only came to the clear opinion which they ultimately expressed on deep reflection, and painful investigation.

There were appointed on that Committee fifteen Members, whose

Members of that  
Committee.

names I will now mention : Lord Viscount Howick, Sir Robert Peel, the humble individual who has now the honour to address you, Mr. C. W. Williams Wynn, Mr. Tancred, Sir William Follett, Mr. Charles Villiers, Sir Frederick Pollock, Mr. Roebuck, Lord Stanley, Sir George Strickland, Sir Robert Harry Inglis, Mr. Serjeant Wilde, Sir George Clerk, and Mr. O'Connell.

Of these names, my Lords, there is only one on which I will venture to make any remark, that of my Friend, Sir W. Follett ; for he is absent from severe illness. In common with the whole profession, I hope his absence will be of short duration. Sir William Follett, I will be bold to say, is one of the greatest lawyers that ever appeared in this or any age since law was cultivated as a science in England. That Committee, consisting of Sir William Follett and of others most eminent in our profession, whose merit is not yet stamped by judicial promotion, but who, I predict, will be great ornaments to the bench ;—and of statesmen of the first rank, who have devoted their lives to the study of the constitution of their country ;—that Committee, so formed, entered most deliberately into the consideration of the question ;—they paid the most respectful attention to what had fallen from my Lord Denman ; there was a careful investigation by the Committee of what had been done on former occasions, and what had been said by former Judges ; and that Committee, with one dissentient voice, came to the resolution that this Privilege does belong to the House of Commons, and that the House of Commons, without this Privilege, could not duly exercise its functions.

My Lords, there was one dissentient, a most respectable individual, who was by himself in a minority,—for whom I have the most sincere respect,—Sir Robert Harry Inglis. He dissented ; but there concurred in that resolution, Sir George Strickland, Sir Frederick Pollock, Mr. Charles Williams Wynn, Sir William Follett, Lord Stanley,

Sir George Clerk, Mr. Serjeant Wilde, Mr. O'Connell, and Sir Robert Peel. And if we are to cite the Parliamentary authorities in this discussion, I use the

Speech of Sir R.  
Peel on bringing  
up Report, 30

May. 8 June,  
1837. Hansard's  
Debates, vol. 38,  
30 May, 1837,  
p. 1129; 8 June,  
p. 1265.

freedom of referring your Lordships to a speech of Sir Robert Peel on the existence of the Privilege, and the exclusive jurisdiction of the House,—distinguished for its constitutional and legal learning, and for the soundness and conclusiveness of its reasoning.

My Lords, all these individuals concurred in this resolution; it was reported to the House; it was adopted by the House, after discussion; and eventually there was a division,—upon which there were 126 in favour of the resolution, and thirty-six against it; leaving a majority in favour of the resolution of ninety.

Now, my Lords, I cannot help thinking that that opinion so formed, so expressed, so adopted, may be weighed against the opinion which, without an opportunity of consideration, was expressed by one individual, however eminent in station, or however highly gifted.

My Lords, I have now concluded my argument. I have discharged my duty to the best of my ability, but I fear imperfectly. I will make no apology to your Lordships for the time that I have occupied; I humbly apprehend, that in arguing such a question, that portion of time is to be cheerfully devoted to it which its importance requires.

And now, my Lords, I cannot say, as I have sometimes said, that having discharged my duty, I am indifferent as to the result. I look, my Lords, with the most painful anxiety to the decision of the Court on this question,—convinced that upon the result of the controversy depend the usefulness of the House of Commons, and the best rights of the people of England. It is now to be settled, whether the people are to be informed of the proceedings of their representatives,—whether they are to be confined to the statute book,—or whether they are from time to time to be instructed with regard to the facts and reasons upon which the laws proceed which they are called on to obey. No judgment of a court of law can be effectual to deprive the House of Commons of the privilege it now claims. There are ways known to the constitution of nullifying the erroneous decisions of courts of law against privilege; but I own that I,

a lover of concord and tranquillity, cannot look forward without dismay to the scenes through which we might have to pass in the conflict. My Lords, why should this be necessary? Why should not things be allowed to remain as they have been for at least a period of two centuries,—a period of unexampled liberty and prosperity. I am against innovation. My respectful prayer to your Lordships is *stare super antiquas vias*. If there be danger from the Houses of Parliament assuming powers not constitutionally belonging to them, let me remind your Lordships that there may be greater danger from the encroachments of courts of Law, and that the confusion and mischief they might occasion would not be less severely felt, although the stretch of authority on the part of the Judges proceeded from motives the most pure and patriotic. I trust with unbounded confidence to the case receiving a deliberate and an impartial and a candid consideration from all your Lordships. I am not afraid, my Lords, of any pre-conceived opinion, or of any opinion that may have been previously expressed. What is more, my Lords, I am not afraid of the applause which has been bestowed by certain persons, I must think rather inconsiderately, and irregularly and prematurely, pending the suit, on the noble and learned Chief Justice, for the course he has pursued. I know that his Lordship would be ready to sacrifice to the discharge of his duties any glory he might be supposed to have acquired in the struggle; that his Lordship would consider it his truest glory justly to administer the law, according to the principles upon which his predecessors have acted and the steady maintenance of which affords the best guarantee for the permanent enjoyment of our rights and liberties.

My Lords, there has been reference made on this subject, and I consider very preposterously to the oaths of the Judges,—as if the oaths of the Judges require that they should decide against Privilege. The oaths of the Judges as I apprehend, require that they shall duly administer the law of the land according to the doctrines of that law as expounded by those who have preceded them; and this Privilege being part of the law, according to the oaths of the Judges this Privilege is to be recognized, instead of being overruled.

Improper reference to the oaths of the Judges.



My Lords, I beg leave to recall to your Lordships very respectfully the advice given by Lord Bacon to a Judge of the Common Pleas, when sworn before him, "That he would take care to confine the jurisdiction of the Court within the ancient merestones, without removing the mark."

Advice given by  
Lord Bacon to a  
Judge of C. P.

I would likewise seek to impress upon your Lordships, memorable words of Lord Tenterden, showing his sense of the extreme importance of Courts confining themselves to their assigned jurisdiction. He was a Judge most anxious that every wrong should be redressed; but he knew his proper sphere and respected privilege; he was one of that constellation of Judges of which Chief Justice Fortescue was so bright an ornament, containing all the great names that have adorned the seat of justice in this country, who have contented themselves with purely expounding the Common Law, and have left the Law of Parliament to those tribunals to which by the constitution it is intrusted,—different men indeed from Kelynge, and Jeffries, and Scroggs.

*Dictum* of Lord  
C. J. Tenterden,  
in *ex parte* Cowan  
3 Barn. & Ald.  
130.

The words I refer to were used by Lord Tenterden on refusing a rule for a prohibition to the Lord Chancellor sitting in Bankruptcy. How he would have treated an argument involving a claim of right to grant a prohibition to one of the branches of the legislature, your Lordships may conjecture. On that occasion he observed, "We wish not to be understood as giving any sanction to the supposed authority of the Court to direct a prohibition to the Lord Chancellor sitting in Bankruptcy. If ever the question shall arise, the Court, whose assistance may be invoked to correct the excess of jurisdiction in another, will without doubt take care not to exceed its own."

My Lords, I have only now to pray judgment for the defendants.

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NOTE.—On the 28th of May 1839, Mr. Curwood replied, and on

the 31st of the same month, the Court gave judgment for the Plaintiff.

For the Judges of the Court I feel the most sincere respect, esteem and affection. Never have there presided in Westminster Hall magistrates more devotedly anxious to perform in a satisfactory manner, the duties of their high office. But consistently with these feelings, I must say, that I concur in the opinion expressed by the most eminent men at the bar on both sides in politics, that this judgment is erroneous. After great deliberation, a Committee of the House of Commons decided that a writ of error could not be brought upon it without compromising the privileges of the House, and a resolution was taken to resist in a summary manner the prosecution of any such action in future.

Mr. Stockdale nevertheless did bring other actions for the same publication, which led to the commitment of him, his attorney, and the sheriffs of London and Middlesex.

The controversy was at last settled in the month of April, 1840 by a legislative declaration, "that it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published,"—and an enactment, that any proceedings civil or criminal for any such publication, shall be stayed on a summary application to the Court in which they are instituted.

As the judgment of the Court of Queen's Bench proceeded mainly on the ground that this power of publication was not necessary to the due and effectual exercise and discharge of the function and duties of Parliament and to the promotion of wise legislation, I cannot help thinking that the Act 3 Vic. c. 9, amounts to a Parliamentary reversal of the judgment. For the reasons I before assigned I cannot at present enter farther into the question of Privilege, or the manner in which actions in Courts of Law to question the exercise of Privilege by either House of

Parliament ought to be met, and I must content myself with subjoining the statute referred to.

### 3° VICTORIÆ, CAP. IX.

An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers. [14th April, 1840.]

WHEREAS it is essential to the due and effectual Exercise and Discharge of the Functions and Duties of Parliament, and to the Promotion of wise Legislation, that no Obstructions or Impediments should exist to the Publication of such of the Reports, Papers, Votes, or Proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published : And whereas Obstructions or Impediments to such Publication have arisen, and hereafter may arise, by means of Civil or Criminal Proceedings being taken against Persons employed by or acting under the Authority of the Houses of Parliament, or One of them, in the Publication of such Reports, Papers, Votes, or Proceedings ; by reason and for Remedy whereof it is expedient that more speedy Protection should be afforded to all Persons acting under the Authority aforesaid, and that all such Civil or Criminal Proceedings should be summarily put an end to and determined in manner herein-after mentioned : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Par-

Proceedings, Criminal or Civil, against Persons for Publication of Papers printed by Order of Parliament, to be stayed, upon Delivery of a Certificate and Affidavit to the Effect that such Publication is by Order of either House of Parliament.

liament assembled, and by the Authority of the same, That it shall and may be lawful for any Person or Persons who now is or are, or hereafter shall be, a Defendant or Defendants in any Civil or Criminal Proceeding commenced or prosecuted in any Manner soever, for or on account or in respect of the Publication of any such Report, Paper, Votes, or Proceedings by such Person or Persons, or by his, or their Servant or Servants, by or under the Authority of either House of Parliament, to bring before the Court in which such Proceeding shall have been or shall be so commenced or prosecuted, or before any Judge of the same (if One of the Superior Courts at *Westminster*), first giving Twenty-

four Hours' Notice of his Intention so to do to the Prosecutor or Plaintiff in such Proceeding, a Certificate under the Hand of the Lord High Chancellor of *Great Britain*, or the Lord Keeper of the Great

Seal, or of the Speaker of the House of Lords, for the Time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the Report, Paper, Votes, or Proceedings, as the Case may be, in respect whereof such Civil or Criminal Proceeding shall have been commenced or prosecuted, was published by such Person or Persons, or by his, her, or their Servant or Servants, by Order or under the Authority of the House of Lords or of the House of Commons, as the Case may be, together with an Affidavit verifying such Certificate; and such Court or Judge shall thereupon immediately stay such Civil or Criminal Proceeding, and the same, and every Writ or Process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

II. And be it enacted, That in case of any Civil or Criminal Proceeding hereafter to be commenced or prosecuted for or on account or in respect of the Publication of any Copy of such Report, Paper, Votes, or Proceedings, it shall be lawful for the Defendant or Defendants at any Stage of the Proceedings to lay before the Court or Judge such Report, Paper, Votes, or Proceedings, and such Copy, with an Affidavit verifying such Report, Paper, Votes, or Proceedings, and the Correctness of such Copy, and the Court or Judge shall immediately stay such Civil or Criminal Proceeding, and the same, and every Writ or Process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

Proceedings to be stayed when commenced in respect of a Copy of an authenticated Report, &c.

III. And be it enacted, That it shall be lawful in any Civil or Criminal Proceeding to be commenced or prosecuted for printing any Extract from or Abstract of such Report, Paper, Votes, or Proceedings, to give in Evidence under the General Issue such Report, Paper, Votes, or Proceedings, and to show that such Extract or Abstract was published *bond fide* and without Malice; and if such shall be the Opinion of the Jury a Verdict of Not guilty shall be entered for the Defendant or Defendants.

In proceedings for printing any Extract or Abstract of a Paper, it may be shewn that such Extract was *bond fide* made.

IV. Provided always, and it is hereby expressly declared and enacted, That nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by Implication or otherwise, to affect the Privileges of Parliament in any Manner whatsoever.

Act not to affect the Privileges of Parliament.

# **SPEECH**

**FOR**

## **“THE TIMES” NEWSPAPER.**

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**THE QUEEN *v.* LAWSON,—Court of Queen’s Bench.**

### **INTRODUCTION.**

THE Court of Queen’s Bench, on the application of Sir John Conroy, granted leave to file a criminal information against the defendant, as Printer of the Times newspaper, for an article which appeared in that newspaper on the 9th of March, 1838,—the prosecutor having made an affidavit denying the truth of the charge which it was supposed to bring forward against him,—of having while Equerry to the Duchess of Kent, and at the head of her household, improperly abstracted sums of money from her, with which he had bought estates in Wales.

The information came on for trial on the 20th of December, 1838, before Lord Denman. Mr. Thesiger, for the prosecution, having delivered a very able address to the Jury on the merits of the case,—to prove that the defendant was the printer of the newspaper, called a witness, from whose cross examination it appeared that the prosecutor, though not in Court, had accompanied his solicitor to the Guildhall, and was then in a coffee-house near at hand. There were only two other witnesses called, and they were examined to show that the prosecutor was the person alluded to in the alleged libel.

## SIR JOHN CAMPBELL, ATTORNEY-GENERAL.

SO GENTLEMEN OF THE JURY, my Learned Friend Mr. The-  
siger, abruptly closes his case without presenting Sir John Conroy  
as a witness before you, and I am most unexpectedly called upon to  
address you without any previous inquiry into the matters which are  
made the subject of this prosecution. Is Sir John Conroy ill in bed?  
Is he in a distant country? Is he prevented by any dire necessity  
from appearing to explain and justify his conduct? Sir John Con-  
roy is not in Court to hear the praises so lavishly bestowed upon  
him by my Learned Friend, at which he must have blushed, how-  
ever well deserved; but we are told he is in an adjoining room,  
almost within the sound of my Learned Friend's voice, and after  
the taunt which I purposely threw out in cross examining the first  
witness, when I asked whether he is in health, and in a fit state  
to give evidence, he shows no inclination to present himself to the  
Jury. My Learned Friend is contented with merely giving formal  
proof of the publication and innuendoes, and thereupon calls upon  
you for a verdict of guilty, in a prosecution which he says is insti-  
tuted to vindicate the honour of his client.

Gentlemen, it is most painful for me to make any observation  
upon the conduct of a person in the situation of Sir John Conroy;  
but I cannot shrink from my duty. The office I hold places me at  
the head at the bar of England, ever famed for independence and  
intrepidity. I hope that in my person its reputation will not be  
tarnished; and I say with pride, that there is no member of our pro-  
fession who, intrusted with the defence of a party accused, would  
abstain from any topics which fairly belong to the case because they  
might be disagreeable to the prosecutor,—of whatever rank,—in  
whatever employment,—of whatever party. I shall endeavour, ac-  
cording to the best of my judgment, to confine myself within the  
line of my duty as an advocate, but I will not be deterred from the

faithful and zealous discharge of that duty by the apprehension of any consequences to myself.

And I have no hesitation in expressing my extreme surprise at the conduct of Sir John Conroy with respect to this prosecution, and my high disapprobation of the course he now pursues. My Learned Friend says, that he only seeks to vindicate his character from the aspersions which have been cast upon it. In that case, would not his first act have been to instruct his learned counsel to call him as a witness that he might be examined,—aye, and cross-examined,—to explain all that is said in the publication of which he complains, and to show to you and to the world, that if it contains any criminal charge against him, that charge is unfounded.

But instead of this, my Learned Friend, following his instructions, shuts out all inquiry, and tries to prejudice your minds by the opinion of the Judges of the Queen's Bench, which he would represent to you as conclusive. Gentlemen, I complain of this attempt. When the Judges of the Queen's Bench give leave to file a criminal information, they pronounce no opinion whatever with respect to the guilt of the party accused, and merely say there is ground for investigation, and that the case ought to be submitted to the decision of a Jury. My Lord himself will tell you that it is for you alone to decide upon the guilt or innocence of the defendant, without regard to the opinions of others, and that he is still to be presumed to be innocent till you determine that he is guilty. The jurisdiction of the Court of Queen's Bench in granting criminal informations, which I have always defended in Parliament when attacked, would be intolerable, if the counsel for the prosecution might come to the Jury and say,—will you hesitate to pronounce that a false and malicious libel which has been adjudged to be so by the Court of Queen's Bench? The Court of Queen's Bench has given no judgment on the subject, and has merely on the affidavit of Sir John Conroy permitted him to present the case for your examination and decision,—little thinking that the defendant was to be presented to you prejudged and condemned.

There is no more discreet advocate at the English bar than my

Learned Friend,—but considering the course to be pursued in evidence, there was one expression which fell from him in addressing you, which, with great deference, was rather inconsiderate. Said my Learned Friend, "Sir John Conroy challenges inquiry, and presents himself face to face before his accuser." Where is Sir John Conroy who was to meet us face to face? How do you account for his being so near the spot and not showing himself? Had he intended to be present, but his heart failed him as the time drew near? It would have given me the most sincere pleasure, if on examination, and cross-examination, he had furnished a full and satisfactory explanation of his conduct, and in that case I should have been willing for my client at once to have made any apology, and to have submitted to any judgment the Court might have been pleased to pronounce upon him. But Sir John Conroy, eager to vindicate his character, comes so near the Court that he may be in constant communication with his counsel,—and no doubt having been informed of our challenge, does not venture to show himself. A prosecutor who seeks to vindicate his character should come before a Jury and explain the matter that is charged against him, and subject himself to the cross-examination of his accuser.

Mr. *Thesiger*.—This is not what you did yourself a few days ago in the *Queen v. Gregory*.

Sir *J. Campbell*.—That case bore no resemblance to the present. But I will remind my Learned Friend of similar cases where a very different course was pursued. In the *King v. Shackell*, which was tried in the year 1827, a gentleman of the name of Hartshorn, a Cambridge undergraduate, on whom a foul imputation had been cast in the *John Bull* newspaper, while he was on the continent,—hurried home as soon as he heard of it, and applied for a criminal information, which was granted. How did he comport himself on the day of trial? Did he come into the neighbourhood of the Hall and instruct his counsel merely to give the formal proof of publication, and that H. stood for Hartshorn, relying on the supposed previous decision of the Court of King's Bench? No! he presented himself in the witness box;—upon oath he gave a full refutation of



the charge; he explained the whole of his conduct. He went further, he called witnesses (amongst others the Reverend Mr. Dibdin) acquainted with facts which proved his innocence. The consequence was, that Sir James Scarlett on his descending from the witness box, shook hands with him in open Court. My Lord, then at the Bar, and counsel for the Defendant, applauded him; and he completely got over an imputation, which, of all others, is the most difficult to encounter.

I will give you another instance still more striking. His Royal Highness the Duke of Cumberland, in a book published by a vile calumniator, was charged with murder and other crimes, which I may not mention. His Royal Highness applied by my Learned Friend, Sir Charles Wetherell, for a criminal information,—which, being filed by leave of the Court, came on to be tried in the year 1833, before my Lord, then elevated to the high office, which he now adorns? Did the Duke of Cumberland say the Court of King's Bench had already decided the case on the merits, and content himself with proving, that D—— C—— meant Duke of Cumberland? No Gentlemen, he wished to vindicate his character, and he did so effectually; for he called Sir Wathen Waller, who was privy to all the circumstances connected with the death of Sellis; he called Mr. Place, who had been foreman of the Coroner's Jury, which sat on Sellis; aye, His Royal Highness presented himself in the witness box, he was fully examined; he entered into a minute and circumstantial account of the whole affair, and proved to the entire satisfaction of all mankind, that the charges against him were foul and false. Gentlemen, the Duke of Cumberland, then brother of the reigning sovereign, now his Majesty, the King of Hanover, and heir presumptive to the throne of these realms, did not disdain to subject himself to such an ordeal; and he was rewarded by the unanimous verdict of the British nation in his favour. From that moment the calumnies with which he had been assailed have entirely ceased, and his character so far has been above suspicion.

But, Gentlemen, if Sir John Conroy, for any reason, disliked being

a witness,—for the vindication of his character he might have brought a civil action, and both parties would have come before you on equal terms. I hope, by and bye, to show you that this article does not contain any charge against him ; but if it does, why does he not bring his action and afford an opportunity to justify the truth of the charge ; whereupon, a Jury would, according to the truth or falsehood of the charge, find for the Defendant, or for the Plaintiff with damages commensurate to the injury inflicted. Perhaps my Learned Friend would say, that an application to the Court of Queen's Bench affords the opportunity of trying the truth or falsehood of the charge, as affidavits are received on both sides. This is true to a certain degree, where the facts stated are in the personal knowledge of the author of the publication, although even there, written depositions astutely worded must be much less satisfactory than a parol examination before the Jury, who may themselves put questions for their own guidance. But in cases like the present, where the statement is made on the information of others, the means of justification on the ground of truth almost entirely fail. Gentlemen, you may be aware, that where issue is joined in a civil action, the truth of the accusation being pleaded in bar,—all witnesses may be compelled at the pleasure of the Defendant, to attend under a subpœna, and to disclose before the Jury all that they know upon the subject, however reluctant they may be to come forward, and however desirous, either from selfishness or delicacy or good nature, to be silent. But the making of an affidavit to shew cause against a criminal information is a purely voluntary act ; it is known to be so ; there is great odium attending it ; and in practice it is declined, unless prompted by personal hostility. Thus, before the Judges of the King's Bench, there may be no means of shewing the truth of a charge, which before a Jury might be easily established.

But the prosecutor now exultingly tells you, that with the truth or falsehood of the charge, you, the Jury assembled to try this criminal information, have no concern, and that you are only to consider whether the publication complained of contains a defamatory

charge. Gentlemen, I must with sorrow and shame confess that the law upon the subject is as my Learned Friend has laid it down. Upon an indictment or information for libel, truth is no justification, even with an absence of all malicious motive. The law *in its wisdom* says, that libel is a crime,—not like an assault, because it wrongs another,—but because it provokes to a breach of the peace, and that the breach of the peace is fully as probable where the charge is true as where it is false. Hence the maxim, “the greater the truth the greater the libel.” If you know of any offence being committed, you are to go before a magistrate and lay an information; but you are never to speak or write of any offender whose guilt you cannot establish by your own evidence, and whom you are not prepared to prosecute in a Court of justice. What you state on any other occasion, however true, is conclusively to be taken as calumnious. But, Gentlemen, I am humbly of opinion with Lord Brougham, and the present Lord Chancellor, that the rule by which on such occasions all inquiry into the truth of the charge is excluded, is a reproach to the administration of justice in this country. I allow it would be most dangerous to say, that in every case the truth of the charge shall of itself be a defence. In some cases I think truth may be an aggravation. Suppose a boy at college has been guilty of some youthful indiscretion, is this to be published to the world at the distance of half a century, when he has long been a right reverend and pious dignitary of the Church? A young girl is seduced and has a child, the birth of which is concealed. She afterwards marries, and conducts herself most respectably. When she has become the respected mother of a numerous family, may her shame be proclaimed with impunity by a man actuated by revenge, because she will not listen to his criminal addresses? My proposal which I have brought forward in Parliament, and which I do not despair of seeing carried before I die, is, that the party prosecuted for a libel should be at liberty to plead that the charge is true, and that he published it without malice,—the prosecutor being empowered to deny either branch of the justification,—so that the man may be punished who publishes slander either falsely or maliciously,

—but no man shall be punished as a criminal who publishes the truth with a desire to do good. I cannot help thinking that the amended law would be effectual in repressing the licentiousness of the press, and protecting private character. At present the exclusion of truth brings some scandal on the administration of justice ; and real libellers,—those who live by slander,—men who could be shewn to invent and propagate base calumnies from the most malicious or sordid motives, are sometimes enabled to get up a cry in their favour,—that they are the victims of the existing law of libel.

But, Gentlemen, I admit that the Jury in trying such a case as this can make no distinction between the hired slanderer and the moralist who denounces crimes for reformation of manners, and that if the publication does contain the supposed charge against the prosecutor which the information avers, my Learned Friend would be entitled to object to my calling witnesses, or offering by the confession of the prosecutor himself to prove that in all particulars the charge is true. *He* might have entered into the inquiry ; but he has the law on his side, if in this prosecution for character he chooses to take advantage of it.

Still, Gentlemen, I hope that, according to the strictest rules of law, I am entitled to your verdict ; for the prosecutor is, at all events, bound to show to your satisfaction, that the construction he has put upon the publication is the right one, and that it does contain the charge against the prosecutor of which he complains. I am sure the prosecutor feels that—he is not liable to such a charge, and I am rather at a loss to understand why he should suppose that it is preferred against him by another. His Lordship will observe, that the information contains three counts with the same gravamen—each alleging that the object of the publication was to induce a belief, that Sir J. Conroy had defrauded the Duchess of Kent, and that he had purchased estates in Wales with the money of which he had so defrauded her. It is very extraordinary that this is the only part of the publication which is complained of, and when I have shown, that this is misconstrued, my client must be ac-

quitted. The information contains no complaint of what is said of the "red ribband" or "the pension" or "the peerage," or "the embassy to Sweden." Nay, it says nothing of his supposed disrespectful conduct to King William IV. It does surprise me that this should be passed over by the Gentleman who drew the information from the instructions of Sir John Conroy. It would at any time be a grave accusation against a subject of this country that he has been guilty of personal disrespect to the King—which an enlightened love of our free constitution would prevent any good subject from exhibiting, whatever may be the qualities of the Sovereign on the Throne,—and which would be an offence of great aggravation if committed towards his late Majesty,—who, if not celebrated for his great talents or acquirements, will ever be remembered for his goodness of heart—for his honesty of purpose—for his affability—and for his kindness to all who approached him;—an insult to him would be doubly culpable from one living in the family of the Duchess of Kent, who must have been most anxious that all under her influence should treat him as the object of devoted loyalty and affection.

But the only question now for your consideration is, whether this publication does impute to Sir John Conroy that he defrauded the Duchess of Kent, and bought estates in Wales with the money obtained by peculation. Gentlemen, I have no hesitation in saying, that there is no foundation for such a charge, and I insist before you no such charge is made by this publication. It is not enough, that by a strained construction such a meaning might be put upon some of the words employed: you are to consider whether necessarily and naturally they bear this meaning, and you will not be disposed to make an effort to favor Sir John Conroy, if he be desirous of being considered the object of such an accusation. You must not be led away by the warmth of my Learned Friend, who considered that this article was a libel even on the Duchess of Kent. Gentlemen, I should have deeply deplored, if by any ingenuity it could be tortured into any reflexion on that Royal Lady, whose conduct has ever been irreproachable, and to whom the nation is

under such a debt of gratitude ; but it only states, that while her affairs were in the management of Sir John Conroy, they got into a state of embarrassment—a fact not denied, and a fact not at all discreditable to her—nay, not discreditable to Sir John Conroy. The embarrassment might, and I believe mainly did arise from the inadequacy of the allowance granted to her Royal Highness for the support of herself and her illustrious daughter, then the heir presumptive to the Throne, and now our Sovereign and liege Lady. There is no allegation or insinuation that any money was abstracted from the hands of the Duchess of Kent, or misapplied by the persecutor, and he must be considered as entirely free from any such misconduct.

[After various other observations to show that the paragraph did not properly bear the meaning imputed to it, the counsel observed.]

Let me remind you, Gentlemen, that this is not an affair of private life. Sir John Conroy is not an obscure individual, whose domestic privacy is wantonly invaded. He is a public character ; he is subject to public censure. Remember, Gentlemen, that as head of the household of the Duchess of Kent, the mother of the future monarch, he held an office of great importance and delicacy ; the public interest justified an inquiry into the manner in which he had discharged the duties of that office ; the station to be assigned to him at the commencement of a new reign was a matter of national concern.

For these reasons, I trust you will be clearly of opinion, that my client is entitled to your verdict. Gentlemen, I should feel sincere regret, if the feelings of Sir John Conroy were in any degree wounded by the writer of this article ; but how is the respectability of the periodical press to be preserved, if the discussion of a public question in a public Journal is to be punished with fine and imprisonment ? Is there not a danger that men of education, men of talent, and men of honor, will not expose themselves to such a peril ? The periodical press has now become the chief source of amusement and of information to the people. What calamities might not be anticipated from its falling into the hands of the ignorant, the venal,

the reckless,—who having received the wages of calumny would contentedly carry on their infamous trade in a gaol without any feeling of degradation? The journalist's is as honourable a branch of the profession of Letters as that of the Reviewer or the Author of avowed publications ;—it affords scope for a display of learning and ability not less than the bar or the senate ;—in other countries it leads to the highest offices of the state. The good of the community requires that nothing should be done to prevent it from holding its due rank in public estimation—which it cannot do if those engaged in it are to be treated as criminals because something has been published hurtful to the feelings of individuals.

Consider the difficulty of conducting a Journal like “The Times,” and say whether some indulgence is not to be shewn to the mistakes it may commit. It presents you every morning as much reading as in an ordinary type would make a good sized octavo volume ; it gives you intelligence obtained with inconceivable celerity and by unbounded expense from every corner of the globe ; it communicates to you a full and accurate account of the proceedings not only of the two Houses of Parliament, but of all courts of justice from the High Court of Chancery to the Petty Sessions ; every sort of domestic intelligence which can interest any class of the community is furnished by it,—and the political views of its conductors are enforced by original articles in the reasoning of which you may not concur more than myself, but which I think all must allow for their force and elegance to be creditable to the literary character of the age. However zealous and warm and unsparing it may have been in party disputes, or in discussing the supposed merit or demerits of public men, it has constantly abstained from tittle tattle and gossip, and respected the sanctity of private life. I believe I am justified in saying that this is the first time during a period of forty years that any proceeding of a criminal nature against the Times Newspaper has been brought before a Jury, and you will hesitate long before you pronounce a verdict of guilty. What would be the consequence of such a verdict to my respectable client the printer of The Times ? He would be liable not only to be fined, but to be sentenced

to imprisonment in Newgate among common malefactors, though not the author of this article and personally ignorant of its contents; and I should tell you, Gentlemen, that every one holding a share in the property of the newspaper—clerical or lay,—male or female, young or aged,—married or single,—if proceeded against, would in point of law, be equally subject to the same punishment. It is only from the effect of use and familiarity that we are not shocked by such a proceeding, and we do not see that it forgets or confounds all the principles and the distinctions on which the criminal code is to be framed in a civilized land.

To Sir John Conroy, if you acquit my client for the reasons I have urged,—no ill consequence can arise. I call for your verdict on the ground that the publication does not impute to him, as he supposes, that he was guilty of peculation and fraud. It leaves him in possession of his character,—which I am quite willing shall be taken as unimpeachable. Your verdict of *Not guilty* being pronounced, he will go from this Court, or from the neighbourhood of this Court, with his reputation untarnished, and he will be held in the same estimation as before this prosecution was instituted, and before this publication appeared. What I say, Gentlemen, is,—not that he has done anything wrong,—but that he is mistaken,—he is under an entire misapprehension in supposing that any charge is brought against him;—he is without an accuser, and your verdict acquitting the defendant will likewise acquit Sir John Conroy of ever having been made the subject of accusation.

The case, Gentlemen, is now in your hands. You are aware that Mr. Fox's act, which did so much for the liberty of the Press, refers the question of Libel or no Libel entirely to the Jury—contrary to the spirit in which my Learned Friend, Mr. Thessiger, addressed you, and which rather reminded me of the times of the Dean of St. Asaph, when lawyers contended and Judges ruled, that the question of Libel or no Libel was exclusively for the Court, and that the Jury had only to consider whether the defendant had published the alleged libel, and the innuendoes, if any, were formally proved. By the immortal efforts of Erskine, the greatest advocate that ever



appeared at the English bar, and one of the greatest champions in the cause of freedom (to him belongs the chief glory of this constitutional victory, though Mr. Fox is to be gratefully remembered for his patriotic aid), all the cavils, subterfuges, and subtleties by which it was formerly attempted to shackle free inquiry are swept away, and no one can now be punished as a libeller till twelve of his fellow-countrymen have agreed that he has published that which is deserving of punishment. I despair of any statutable definition of libel which shall exclude no publications which ought to be suppressed, and include none which ought to be permitted ;—but we are safe while an English Jury shall exercise an independent judgment upon every case which is presented to them. In this case the Judges of the Queen's Bench have not given, and had no right to give any opinion. My Lord who presides here will not give any opinion upon the question of libel, but as a constitutional Judge will leave this question to you the Jury. Some Judges after the passing of the libel Act, which requires the Judge upon a trial for libel to give his opinion in point of law *as in other cases*, were in the habit of saying, “the question of libel, Gentlemen, by the Act you are to determine, but I am bound by the Act to give you my opinion of it, and I have no hesitation in stating as my opinion that this is a gross, wicked, and diabolical libel.” A learned Judge presiding in the Crown Court might as well say to a Jury “this, in my opinion, is flat burglary,” or is “an atrocious robbery,” or is “a foul murder.” In no criminal case is the Judge to draw an absolute inference of guilt. He is to tell the Jury what is the quality of the offence in point of law, assuming a certain state of facts of which the Jury alone are to judge ; and he can only give a conditional or hypothetical opinion as to the verdict, according to the conclusion of the Jury upon questions of fact. Therefore since the present enlightened Chief Justice of this Court has presided here, he has upon such occasions given no absolute opinion as to the publication being a libel, but has left its construction, and its tendency, and the intention of the writer, entirely for the consideration of the Jury.

It lies on the prosecutor to convince you, and each and every one

of you, that this publication is defamatory, and that it bears the exact construction put upon it by the information. I submit to you that it contains no charge of speculation or fraud against the prosecutor, and that the construction put upon it by the information is strained, unnatural and fallacious. So thinking, you will find a verdict of acquittal.

Gentlemen, I have done my duty, and I have only to thank you for the patient attention with which you have honoured me. But anxiously solicitous for the satisfactory administration of criminal justice in this country, I cannot conclude without expressing a hope, that for the future when an application is made to the Court of Queen's Bench for a criminal information, with a view to the vindication of character, the prosecutor will present himself as a witness before the Jury,—that he will not remain in the purlieus of the Court during the trial, or shrink from the ordeal to which he professes a wish that his case should be submitted.

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NOTE.—Lord Denman left the question of libel to the Jury, but fully justified the conduct of the prosecutor in not appearing as a witness, after he had cleared himself by his affidavit on which the rule was granted.

The Jury found a verdict of *guilty*, and the defendant was afterwards sentenced by the Court to a month's imprisonment, and to pay a fine of 200*l*.

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I am afraid that the law as far as concerns the nature of the writings which may be treated as libels must always remain indefinite, and that the effectual protection against publications injurious to private character, or dangerous to the community, and against vexatious or oppressive proceedings dangerous to the freedom of the press, can only be found in the discrimination and firmness of

Juries, who may acquit or convict as they think that the intention of the accused was innocent or malicious, and the alleged libel was fitly or improperly made the subject of a criminal prosecution. But the reproach upon the administration of justice that on the trial of an indictment or information for a libel the truth or falsehood of the charge is to be entirely withdrawn from the consideration of the Jury and the Court, I am convinced, after much deliberation, might be removed,—with the reasonable hope that thereby there would not only be greater safety to free discussion, but that thereby the licentiousness of the press would be restrained. The doctrine that truth may not only be a libel, but that the truth of the charge can in no case be used as a justification, or an ingredient in the defence that the publication was not malicious,—confounds all the distinctions of law and morals,—affords a pretext to those who publish what they know to be false, to say, that if permitted they could prove the truth of the calumny,—and tends to excite sympathy in favour of those who are justly convicted and punished.

Although since the answers of the Judges to the questions propounded to them by the House of Lords in the year 1792, when Mr. Fox's Libel Bill was passing through Parliament, it must clearly be taken, that according to the law of England, on the trial of an indictment or information for a libel the truth or falsehood of the charge is immaterial, it is remarkable that PEMBERTON, in the reign of Charles II, permitted evidence to be given on an indictment for libel as to the truth of an allegation that Sir Edmonsbury Godfrey had murdered himself; and in the famous case of *R. v. Fallow*, in the year 1702, the Attorney and Solicitor-general, counsel for the Crown, seemed to think, that, as a matter of course, the defendant might prove the truth of the charge as a defence, and the great HOLT repeatedly offered to let him prove the truth if he could. Holt, C. J. “What do you say concerning the publishing these books?—Can you make it appear that they are true?—You might have had subpoenas for your witnesses against this day.—If you take on you to write such things as you are charged with, it lies on you to prove it at

22 Sta. Tri. 298.

14 Sta. Tri. 534.

your peril.—If you have any witnesses I will hear them.—If you have any witnesses, produce them."

The famous case of the King v. Franklin in 1731,—the prosecution by Sir Philip Yorke of a number of *The Craftsman* written by Lord Bolingbroke,—is the first reported case in which I find it ruled that the truth might not be given in evidence on such an occasion,—although Lord Raymond who presided at that trial said, "he was only abiding by what had been formerly done in other cases of the like nature."

Without notice to the prosecutor, evidence of the truth of the charge could not be fairly admitted; but if the Defendant were allowed to plead in bar to the indictment or information that the charge is true, and that the defendant published it without malice—leaving the prosecutor to traverse either allegation, or the whole plea, I cannot help thinking that private character would enjoy all the protection which it can reasonably claim, and that those who fairly publish criminatory matter with a view to the public good, would be redeemed from the perils by which they are now environed.

Is it not monstrous that a swindler convicted of a gross fraud, who if he were to bring a civil action would be dismissed the Court on the production of the record of his conviction, may prefer an indictment and be entitled to a verdict of guilty, and to pray sentence of fine and imprisonment on his accuser,—who is forbidden to use the same record of conviction either as a defence or in mitigation of punishment?

After such an alteration in the law a conviction upon a prosecution for libel would be a much more satisfactory vindication of character than can be obtained at present by any criminal proceeding.

It may be said that it is now open to a party slandered to bring a civil action, in which the Defendant may plead the truth of the charge as a justification; but this course is open to the imputation that the plaintiff in asking for pecuniary damages, is seeking to make a profit by the injury to his character; the evidence of the com-

plainant may be often required to clear his innocence and could not be admitted in a civil action ; and where there has been a wilful and deliberate attack on private character founded on falsehood, or prompted by malice, the interests of society demand that the slanderer should be liable to be punished by imprisonment, in the same manner as if he had assaulted and wounded the person of his victim.

The apprehension of a justification would deter persons justly charged with crimes from instituting prosecutions against those who have from praiseworthy motives exposed their misconduct, and no one really wronged need scruple to seek redress. If a case should occur where the truth is published to the world from malicious motives, here the law would inflict its highest vengeance, and by the example give security to those in the enjoyment of reputation notwithstanding past errors—which they have renounced and for which they have atoned.

Henceforth the cautious and honourable man without apprehension would communicate facts of which the public ought to be informed, and the slanderer would have strong motives to abandon his trade, as he would know that he might at any time be held up to infamy as the convicted inventor of calumny.

Unfortunately the times are by no means propitious for attempting any further improvement in the administration of justice ; but I shall introduce for the consideration of the legislature a measure such as I have described, as soon as I think there is any reasonable prospect of its being adopted.

# GENERAL REGISTER OF DEEDS.

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HOUSE OF COMMONS, December 16, 1830.

## INTRODUCTION.

THE following is the first speech I ever made in the House of Commons. Being at the head of the commission appointed by the Government in the year 1837 to inquire into the Law of Real Property in England, I thought with my colleagues that the foundation of all improvement in this branch of the law would be a General Register of Deeds affecting real property—a measure adopted in almost every other civilized country, and which never has been tried in any country without being found beneficial, and without being permanently adhered to. My chief motive for desiring a seat in the House of Commons was, that I might bring forward this and similar improvements of the law, and I was sanguine enough to believe that Law Reform would excite general interest, and would be favourably received by the representatives of the people.

I was fated, however, to find an entire indifference as to all such matters on both sides of the House,—except that my grand scheme

of a General Register met with the most lively opposition. This was chiefly caused by the country attornies,—the most influential class in this kingdom,—who had taken up the notion without any sufficient ground, that the measure would greatly diminish their business and their profits. They exerted all their power to defeat the bill by getting up petitions against it, and still more, by swaying the votes of the very large class of Members in the House of Commons under their control.

In consequence, no progress could be made with the bill in the Session 1830-31. I reintroduced it in the following Session—when it was referred to a numerous Select Committee, constituted about equally of those who had supported and those who had opposed it. This Committee sat many days, examined witnesses and considered the subject most deliberately and candidly. The result was, that with hardly a single exception the Members of the Committee expressed in the Committee a clear opinion in favour of the Bill. However, when it again got back to the House, the clamorous opposition from without was rather increased than quieted. I was obliged to abandon the measure in despair, and there never has occurred an opportunity when I could again introduce it with any prospect of success. However, according to the observation of Sir E. Coke—a good Bill once brought forward in Parliament is never finally lost, although long opposed from prejudice or interest, and I trust the establishment of a General Register for Deeds will not be much longer postponed. The perusal of the following speech may have some effect in illustrating its advantages, and obviating the objections which have been made to it.

In the mean time I have the satisfaction to think that while I was a Member of the House of Commons I did introduce and was able to carry bills, by which a greater alteration was introduced into the law than in any reign since the time of Edward I., and the most essential benefits have been conferred upon the community.

The antiquated tedious, harassing, expensive, and perilous system of Fines and Recoveries has been abolished, and the object is now

accomplished by a simple deed, which may be executed at any time by the parties.<sup>(a)</sup>

The law of Descent is rendered rational and harmonious, and an estate no longer goes to a distant collateral relation rather than to the brother of the half blood of the first purchaser.<sup>(b)</sup>

The law of Dower, without any injury to widows, is amended so as greatly to simplify conveyances and to clear titles.<sup>(c)</sup>

Prescription, or the Statute of Limitations, giving an indefeasible title by adverse possession,—which in some cases was five years and in others might be extended to five hundred,—is now systematic and uniform, and an enjoyment as owner for twenty years bars all claims at law or in equity.<sup>(d)</sup>

Formerly a freehold property of the minutest value could not be devised without a will attested by three witnesses, while copyhold land worth 50,000*l.* a year, as well as personal property to any amount, might be disposed of by a will without any witness at all and not even signed by the testator. Now all wills of real and personal property are to be executed in the same manner, and are valid if attested by two witnesses.<sup>(e)</sup>

The bill which I introduced for Abolishing Copyhold Tenure has not passed, although Sir R. Peel expressed a favourable opinion of it, but it has produced a modified measure which last Session received the sanction of the legislature, whereby some of the most odious and mischievous incidents of that tenure will gradually be done away with.<sup>(f)</sup>

The bill which I introduced for Abolishing Imprisonment for Debt was carried as far as concerns arrest on mesne process—or before judgment.<sup>(g)</sup> This important measure, practically speaking, was a greater security to the liberty of the subject than the *Habeas Corpus* Act, as formerly it was in the power of any individual, without the sanction of any court or the warrant of any magistrate, to throw any other individual into gaol, and to detain him longer without

(a) 3 and 4 W. 4, c. 74.

(b) 3 and 4 W. 4, c. 106.

3 and 4 W. 4, c. 105.

(d) 3 and 4 W. 4, c. 27.

(e) 9 W. 4, and 1 Vic. c. 26.

(f) 4 and 5 Vic. c. 35.

(g) 1 and 2 Vic. c. 110.



trial than if he were imprisoned on a charge of felony or treason. Where the debt really existed, this power of imprisonment only led to a waste of the property from which the creditor might have been satisfied, and to the degradation and corruption of its unhappy victims.

The result has been so satisfactory that I hope before long to see the same principle extended to imprisonment after judgment—recognizing the distinction between the fair and fraudulent debtor—and making deprivation of liberty a punishment for crime—not an aggravation of misfortune. But if from the infelicity of the times I can effect no more in the way of legal reform, I hope I may be allowed to derive some satisfaction from the thought, that I have been humbly instrumental in improving the institutions of my country.

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On the evening for which I had given a notice of my motion for leave to bring in a Bill to establish a General Register of Deeds, a party question was brought forward respecting the superseding of a writ for a new election of Members for the borough of Evesham. This drew a crowded house and gave rise to an animated discussion. When it had been disposed of I was called to by the Speaker amidst the noise occasioned by a rush from the House of Members utterly ignorant of the subject I was to handle and determined not to be instructed upon it.

**MR. JOHN CAMPBELL,**

**MR. SPEAKER,** I rise, in pursuance of the notice I have given, to move for leave to bring in a Bill to establish a General Register for all deeds and instruments affecting real property in England and Wales. I should propose a measure of such vast importance with the utmost distrust, if it proceeded entirely from my own opinion of its expediency; but I venture to bring it forward with some confidence, as it is the result of the united labours and the unanimous recommendation of the Commissioners appointed by his late Majesty to inquire into the defects to be found in the law of Real Property in this country, and the improvements of which it is susceptible.

Regret has been expressed more than once in this House, that a Gentleman of whose services the world is now for ever deprived,—I mean my late friend Mr. Humphreys,—was not appointed a member of that commission. I can say truly, that I joined in that regret, and I willingly take this opportunity of paying a humble tribute to his memory. He was a man, who, with a profound knowledge of his profession, had an enlarged and cultivated mind, and was actuated by an ardent desire to improve the institutions of his country. To him the merit belongs of first drawing the attention of the public to the present defective state of the law of Real Property; and although I could not concur in all his theories for the amendment of it, I should have been well pleased to have had him as a coadjutor in the great undertaking over which I was solicited to preside. But it has been my good fortune to be associated with others of distinguished acquirements and capacity. In the absence of the late Secretary of State, for the Home Department, I may be allowed to say, that I believe in following up the resolution adopted by this House, upon the motion of the present

Lord Chancellor, for the appointment of Commissioners to inquire into the law of Real Property, and the practice in the Courts of Common Law, that Right Honourable Gentleman was actuated only by the desire that the object might be most effectually attained; and I cannot refrain from declaring, as he is now no longer Minister of the Crown, that both from my own official communications with him, and from my general observation of his career, I consider him a sincere, steady and enlightened friend of legal reform. Nothing better can be wished for the improvement of the law, than that those who succeed him may in this respect imitate his example. With respect to Mr. Humphreys, it may be satisfactory to the House and to the country to know, that although not a member of the commission, he generously supported us;—that we derived valuable assistance, not only from his writings, but from personal conferences with him,—and that he was a zealous promoter of a General Register.

Sir, this measure is certainly, for good or for evil, one of the most important ever submitted to the attention of the Legislature; and I cannot but lament, that subjects of ephemeral interest, which touch party feelings, generally excite more attention in this House than the discussion of laws which deeply affect the property and the rights of the present and future generations. The House having resolved, that the writ for the election of Members for the corrupt borough of Evesham shall be superseded by the Speaker's warrant, and the hour of dinner having arrived, a general dispersion has taken place, and the benches on both sides of the House are nearly deserted. Nevertheless, under such discouraging circumstances, I shall feel it my duty to explain to those Honourable Members who honour me with their attention, the grounds on which I think this measure is necessary, and will be found salutary and beneficial. They must be aware, that this can only be done by entering into technical details, which no powers of statement or illustration could render amusing.

I can truly say, that I commenced the investigation of the subject without having in any way committed myself, and without

any preconceived opinion, or even bias, to mislead me ; and the result of that investigation is, that a General Register, upon an improved plan, such as I am prepared to propose, would remove many existing evils in the law,—would render the transfer of real property simple, easy, safe and economical,—and would be found a new power, capable of being applied to the most important purposes. I know there are eminent individuals for whose opinions I am bound to entertain great respect, who consider the present law of real property a system of almost absolute perfection. Such men must condemn any change in it as unnecessary and mischievous. I am not blind to the merits of the old common law of England, which in its machinery for separating the law from the fact, and assigning each to a distinct tribunal, excels every other system which I have studied ; but I think it now labours under grievous imperfections, by our adhering to old rules when the reasons for them are gone,—by not adapting our institutions to the altered circumstances of the country, and by forgetting the maxim which ought never to be forgotten,—that Time is the greatest Innovator. Such is the present condition of the law, that where real property is to be transferred or charged, titles are generally found to be unmarketable or unsafe ; those that are safe are often unmarketable, and those that are marketable are often unsafe. From whence does this insecurity arise ? I say, from the want of a General Register, where, by a glance, a knowledge might be obtained of all the deeds and instruments affecting any particular portion of real property, or any interest arising out of it. Without this, no purchaser of an estate, and no person who advances his money on mortgage, can be secure. The title to real property in this, and in every civilised country, does and must depend upon written documents ; and unless you are sure, that you have knowledge of all the documents in existence, affecting any particular subject of transfer or charge, there is no safety for you. Enact that no man's rights shall be injured by any documents affecting real property which are not registered, and the evil arising from the concealment of such documents is instantly cured.

There is an obvious distinction in this respect, between real and personal property. A person in possession of a horse or a bale of goods is generally the absolute owner, or his agent; and a very little inquiry will enable the person disposed to purchase, to find out the person with whom he may safely deal. The title does not depend upon writing; and if there has been a sale, even without the authority of the owner out of possession, his right is gone if that sale was in *market overt*, or by a person whom he intrusted to appear to the world as owner. In experience, the title to personal chattels bought by a *bona fide* purchaser, using reasonable diligence, is hardly ever questioned; and no danger is apprehended against which any precaution is ever taken, beyond inquiry of the vendor at the time of sale. There is neither loss to the purchaser from concealed claimants appearing; nor delay, nor expense, nor inconvenience from any apprehended danger in making the transfer. The occupier of land may be tenant at will, or for years, or for life, or in tail, or in fee simple. The interests are almost infinite which may be carved out of one subject-matter, and which may be concurrent, or made to arise one after another. No notice is given of these by apparent possession, and each may be enforced on production of the instrument creating it. A purchaser or mortgagee is liable to be deceived and defrauded under circumstances apparently free from all suspicion. One known to have been owner of the fee-simple, by a secret settlement reduces his interest to a life estate, without any apparent change in the enjoyment of the land. The heirs-at-law enter on the death of the ancestor, concealing a will, by which he is made tenant for life only, with remainder to his children or some collateral relation. The father under a power of appointment, in default of which his eldest son takes the fee, by a deed duly executed appoints to the son for life, with remainders over: the deed is concealed, and the son takes possession on his father's death. In each of these three cases, a perfect unsuspecting title to the fee is made out by the suppression of a single instrument. A cautious man buys the estate, or advances money nearly to the value of it on mortgage. On the death of his vendor

or mortgager, he is turned out of possession, or loses his security, on the production of the settlement, the will, or deed of appointment,—which makes a case against him in favour of the remainderman, admitting of no question. So the owner of an estate may now, with a little dexterity, mortgage it several times over, without the mortgagees being able to discover the nature or amount of prior encumbrances: and what is particularly hard, a mortgagee has to dread, not only encumbrances prior, but posterior, to his own; for a third mortgagee, by getting an assignment from the first, is preferred to the second. This, Sir, is called “tacking,” or “squeezing.” The second mortgagee is squeezed out, the third mortgagee being tacked to the first. Is it not a reproach to the law, that there should be terms such as these, which are familiar as household words, in the mouths of practitioners?—or rather, that the practices should be tolerated which they are employed to designate? Again, by equitable mortgages, which have recently sprung up, and are lauded by some, enormous frauds may be practised. These are effected by a mere deposit of title-deeds. A man may by a trick get possession of his title-deeds, which ought to be in the keeping of another, and then, by skilfully parcelling them out, raise money to a greater amount than twice the value of the estate. Even without any fraudulent intention,—from mere inadvertence, according to the present system, deeds are sometimes mislaid and forgotten in families; and being afterwards discovered, they must be enforced for the benefit of infants or married women, to the utter ruin of purchasers or mortgagees. From these causes, I do aver, upon the evidence laid before me, that not only is every purchaser and mortgagee subjected to a painful feeling of insecurity, but that actual loss does not unfrequently arise. I have been asked, why there are not more cases in the law reports, in which purchasers and mortgagees have been defeated by a paramount title. The reason is obvious. When such cases occur, they admit of no doubt, and the purchaser or mortgagee having ascertained the genuineness of the deed, which shows that the vendor or mortgager had only an estate for life, on his death can only yield to the person next in remainder.

But there are few Solicitors in considerable practice, who have not known such instances ; many are stated in the Appendix to the Report of the Commissioners ; and I can assure the House, that since it was publicly known that I meant to propose this Bill, a considerable number have been communicated to me from different parts of the country.

The rights of successive encumbrancers, who have advanced their money in ignorance of existing charges, admit of much more dispute ; and the law books are filled with cases respecting them. There are valuable treatises on the subject, deducing rules from these cases with all the pride, pomp and circumstance of classification, subdivision, and analysis. But, Sir, a most inadequate notion would be formed of the evil I seek to remedy, by merely regarding the instances in which loss does actually occur from a defective title. Those instances, comparatively speaking, are rare ; but here is the great evil which I wish most anxiously to impress upon the House, and upon the public—that, as the law now stands, loss may occur in every instance, and that insecurity of title is a risk against which precautions must be and are taken in every transaction respecting real property. Hence the intolerable delay, expense and vexation which are experienced, and of which most of those who now hear me must in some measure be aware, as often as land is to be sold, or a sum of money is to be raised upon it. To supply the defective information derived from the deeds produced, all sorts of inquiries are set on foot. Affidavits are required from old persons living in the neighbourhood, land tax assessments are examined, county histories are referred to, grants from the Crown are hunted up, various public offices are visited, where, perhaps, some information may be obtained respecting debts due to the Crown, the Ecclesiastical Courts are ransacked for wills and administrations, and a round is made of the Courts of Common Law, in a search after judgments. But, with the exception of one very eminent Conveyancer who was examined before us, all who have opposed the establishment of a General Register, have admitted that some expedient is necessary to guard against the suppression of

deeds ; that mere confidence cannot be acted upon ; and that the greatest diligence, without such an expedient, would leave the danger of insecurity too great to be encountered.

The expedient at present resorted to is so complicated and subtle, that I almost despair of making it intelligible to the House ; but its defects and inconsistencies and mischiefs are such, that they may easily be pointed out to any one, however unacquainted with the science of jurisprudence. There are certain entities, called outstanding terms, or legal estates, which are said to attend and protect the inheritance. They originate in matters wholly unconnected with the security of title. I believe there has been yet no instance of a term being created, that it might be assigned as a protection against mesne incumbrances, although there is no saying to what length the system may be pushed by perverse ingenuity. According to the law of England, terms for years of any duration may be carved out of the inheritance ; and whatever their duration may be, they are considered less than a freehold for the life of another ; they are treated as personal estate, and they pass to the personal representative, instead of the heir at law. When these terms are once created, the person in whom they are vested is deemed at law to be entitled to the possession of the land, although his title be a mere shadow, and he has no substantial interest. They usually originate in mortgages and marriage settlements. Land is mortgaged for 1,000 years. When the mortgage is paid off, it frequently happens that the term is not surrendered to the owner of the fee, but it is allowed to remain outstanding in the mortgagee or his personal representative, or is assigned to a trustee to attend the inheritance. So by a settlement a term for 500 or 700 years is given to trustees, to raise portions for younger children, or some such family purpose. When the purpose is answered, without some proviso for cesser, the term is still outstanding in the trustees or their representatives ; or it is assigned, as before, to a trustee, in whom or whose representative, or assigns, according to the doctrine of Courts of Equity (although Common-law Judges sometimes rule differently) it ought to be considered as vested till it expires by effluxion of time. These terms



confer what is called the legal title to the land, the person beneficially entitled, while they are running, having only an equitable estate. Now, if a *bond fide* purchaser or mortgagee, who deals with a person appearing to be owner of the inheritance, can get in one of these terms, it will protect him from all alienations and charges since it was created; for any subsequent alienee or encumbrancer can only have an equitable interest; these equities are supposed to be equal, although accruing successively; and among equal equities, he who has the legal estate prevails. An old term, therefore, is said to supply all the security proposed by a public register, because no prejudice can arise from the suppression of deeds which have been executed since its creation.

Is it possible that machinery so complicated, so clumsy, so ill adapted to its object, can work well? Sir, I do not hesitate to express my decided opinion, that outstanding terms are a substantive evil; that instead of palliating, they aggravate the mischiefs arising from our present ignorance of the true state of any title; and that, even if a Register should not be established, they ought all to be swept away. In the first place, let me remind the admirers of outstanding terms as giving security to title, that over full one-half the landed property in England no outstanding term is to be found; for they have nothing to do with beneficial leases, and are only known to exist where an estate has been within a reasonable time in mortgage or settlement. These Gentlemen, to be consistent, should propose an Act of Parliament for the creation of such fictitious estates over the whole realm,—the result of which would be to prefer in every instance the person who last acquired the right,—although a prior party, whose interest has not vested in possession, may have been guilty of no default. But let us take a rapid view of the mischiefs which the existing system of outstanding terms occasions. In the first place, a man now holds his estate by several titles instead of one, and each title must be formally deduced. Your Conveyancer does not like to ride at single anchor. He is not satisfied with one term; he must keep up several, lest one or two may not cover the whole of the premises, or one of them, if very old, may be

presumed to have been surrendered, or, if rather modern, may be defeated by a prior term brought forward by another party. By one set of deeds, the title to the fee must be deduced without any reference to the terms as if they had never existed. Then each term must be deduced as if the estate entirely depended upon it; and the assignment of the term is generally a more lengthy instrument than the conveyance of the fee; for it ought, according to the rules of good conveyancing, to trace the title to the fee from the last assignment of the term, in order to show that the term is assigned to the party who is properly entitled to the protection of it, as attending the inheritance. Think of the multiplication of voluminous deeds which this system occasions! But this, though a formidable evil, is as nothing compared with the difficulty, delay, expense, and vexation, experienced in finding out the individuals in whom these terms are vested, and obtaining the necessary probates and administrations to make a good title to them. The trustee in whom a term was vested is often found to have been an attorney's clerk, of whom or whose family no trace can be discovered; and there can be no certainty whether he has died intestate, or whether administration may have been granted of his effects. Then there is great danger of miscarriage from the will not being proved, or the administration, whether general or limited to the term, not being granted by the proper jurisdiction. Of all the grievances the people of this country have at present to complain of, this cries the loudest for redress. There are now about 370 Courts which grant probates and administrations. If the probate or administration be taken out in a diocesan or any inferior Court, and the testator left *bona notabilia*, that is, personalty to the value of 5*l.*, in another jurisdiction, or if the premises to which the term applies be in another jurisdiction, the probate or administration is absolutely void. I have in my own practice known repeated instances of parties relying on terms being turned round at *nisi prius*, upon the objection that a probate or administration was void. There are now Right Reverend, Noble, and Learned Commissioners sitting to inquire into the abuses of the Ecclesiastical Courts. I have the

highest confidence in their intelligence and liberality, and I entertain the highest expectations from their labours, which I know to be unremitting. I hope to live to see the day when, for the purpose of proving wills and granting administrations, there shall be no distinction between the provinces of York and Canterbury, or the different dioceses, peculiars, and other districts within those provinces,—when the jurisdiction of the Ecclesiastical Courts upon the subject (which is wholly unconnected with the Church) shall be taken away, and when there shall be one general Court of probate and administration for the whole of England and Wales. The delay, expense, vexation, and disappointment now experienced in getting in outstanding terms would then be greatly mitigated. But even then these terms, when got in, would not deserve to be much relied upon.

The party who has got the term regularly deduced and assigned to his trustee, has formidable dangers to encounter, both in equity and at law, before he can render it available. A Court of Equity says it shall not protect him against any prior encumbrance of which he had notice. Now, notice may be actual or constructive; and the party is supposed to know whatever was communicated to his counsel, attorney, or agent, or is mentioned in any deed submitted to them, or in any deed referred to in such deed, or any fact which he or they might, from what they knew, have been expected to inquire about, and so might have ascertained. Thus, title is made to depend upon loose recollections, and the mistakes and falsehoods of parol testimony. Nay, *lis pendens* is notice, and all the King's subjects are supposed to know the contents of a bill in Chancery, although the suit has been languishing for twenty years. Let us suppose that equity has decreed that the party, as a *bonâ fide* purchaser without notice, is entitled to the benefit of the term; if he carries it into a Court of Law, the Judges there will very likely tell the Jury to presume, that it was surrendered before the last assignment. The equity Judges have bitterly complained of the Common Law Judges for venturing to presume the surrender of a term once assigned to attend the inheritance: but the Common

Law Judges have persevered in their opinion and their practice; and the poor purchaser can never tell whether, when an ejectment is brought against him, the term, which was so highly prized, and which has cost him so dear, will be of any service to him. Then he never can be sure that an older term may not be set up against him, and through this he may be defeated by a party whose title is posterior to his own. The subsequent purchaser or encumbrancer may have acquired this term by something approaching, but not quite constituting, the offence of burglary, and be still allowed the benefit of it. The hon. Member for Weymouth, in one of those publications for which the profession and the public are so much indebted to him, mentions an anecdote of a man, who, in passing a house in which he suspected there was a deed evidencing the existence of an old term he greatly wanted, observed that one of the windows was open, although the door was locked;—whereupon he clapped a ladder to the window, entered the house, found the deed, carried it away, and was held to be entitled to use it against a *bond fide* adverse claimant.

But every Member who has followed me must already have observed, that this expedient of an outstanding term does not operate in any respect as a guard against fraud, or general protection from loss, and that, with a view to the good of the community, it is utterly worthless; for it never operates for the benefit of one man without detriment to another, and it merely changes the victim who is doomed to suffer. It is familiarly called "*tabula in naufragio*." The plank will carry but one. If one man wishes to mount it, he must shove off another, who goes to the bottom. Nay, the system works positive injustice. The rule of natural equity is "*qui prior est tempore potior est jure*;" but the rights of contending parties are made to depend upon the accident of which can get a fictitious title, in itself of no value. I ought to observe, that the system, instead of preventing, positively assists fraud; for, when a purchaser has a term offered as part of the title, he sometimes abstains from easy inquiries, which would show that the estate had been before charged or sold.

to another, and he shuts his eyes lest he should see what he suspects to exist. I would finally observe on this part of the subject, that the fortunate or unfortunate person who is adjudged, both at law and equity, to be entitled to the protection of the term, has at best but a chattel interest instead of the fee, for the reversion is in another; and to the present day it is unsettled, what rights he has under the term during his life, and what interest goes to his heir or personal representative, if he dies intestate.

I may be thought to have dwelt at unnecessary length upon this part of the subject, but I can assure the House, that if I have succeeded in exposing the futility of the protection alleged to be derived from outstanding terms, I have, *ex concessis*, established the necessity for a General Register. Although to protect purchasers and encumbrances from concealed deeds be the chief object of a General Register, there are other evils now severely felt which it would remedy, supposing the original deeds or authentic copies of them to be deposited in the Register Office. Great facilities might be afforded, and much expense saved, when they are to be given in evidence. At present, title-deeds are not unfrequently lost from being left in solicitors' offices, and from various casualties to which they are exposed. Titles thereby become unmarketable; and with respect to tithes, and some other interests, the most serious prejudice may be sustained by the person in possession. The Register Office would put a stop to all inconvenience arising from the loss of deeds for the future. A more serious mischief, and one which gentlemen unacquainted with the details of conveyancing can hardly be made adequately to feel, arises from covenants for the production of title-deeds, and the obligation to give attested copies of them. As property is subdivided and sold in lots, these covenants become every day more common. But infinite difficulty arises in enforcing the performance of them, and on the sale of small properties the expense of giving attested copies to the purchaser sometimes is nearly equal to the value of the fee-simple. A well authenticated case lately occurred, where a gentleman sold an estate to an attorney, and was bound

to furnish him with attested copies of the title-deeds. It was found, that the expense of these attested copies would be enormous ; but the attorney insisted upon having them, and threatened to file a bill in Chancery for that purpose. However, he relented to a certain degree, and said to the vendor, " I will not be too hard upon you. Let me have the estate without paying the purchase-money, and I will waive my claim to the attested copies of the title-deeds." The proposal was joyfully accepted. I need hardly mention, that after the establishment of a Register, all that would be necessary on such occasions would be a reference to the books or compartment in the office in which the deeds would be found. For the same reason, deeds may in future be most materially shortened. It is well known, that they are swelled out to their present unwieldy size chiefly by the recitals of other deeds : such recitals would become unnecessary, and would be discontinued. By this and certain other improvements in conveyancing, which will arise from obviating the necessity for livery of seisin or entry to perfect an estate, and allowing the creating of all estates directly by deed which can now be created by will or through the medium of the Statute of Uses, I hope to see deeds shrink into their ancient dimensions,—when a grant or conveyance seldom occupied more than a piece of parchment ten inches square, instead of consuming as at present, the skins of a moderately sized flock of sheep. The shortening of deeds will thus be a consequence of the Register, and, will be again found greatly to facilitate its operations ; so that, although it may have obstructions to encounter in its outset, when it is once in full play it will proceed with celerity and smoothness.

Sir, I am now brought to consider the objections to an institution which *prima facie* offers such advantages. It shall be my endeavour to overlook none of them, and by no means to understate them. I allow that they deserve the most serious consideration of the House ; but when deliberately and dispassionately examined, I believe they will be found to arise partly from false reasoning, but chiefly from a misconception of facts.

The first grand objection is, that a General Register would be a

great innovation; and we are told to respect the wisdom of our early ancestors, to whom such an institution was unknown. Sir, not one in ten thousand of those ancestors could read or write, for which reason land was transferred, without writing, by corporal delivery; but they did their best to give notoriety to the transaction, and to guard against fraud, by requiring the delivery to be made on a public occasion before the Peers. And this precaution probably was [sufficient; for at that remote æra, the diversified interests in the same land, which are now familiar to us were unknown, and the person in possession was generally owner of the fee. But the necessity for registration, as a guard against secret conveyances and charges, was felt in the reign of Henry VIII, as soon as the Statute of Uses allowed livery of seisin and entry to be dispensed with; and there can be no doubt that the Statute of Inrolments was intended as a general register, although the measure was very clumsily contrived, and was soon entirely evaded, as it was held not to apply to a chattel interest in land. Hence, in due time, sprung up the celebrated assurance of lease and release, by which all the property in the kingdom is now conveyed, having secrecy for its object, and gaining that object so effectually that if the grantor himself prepares the deeds, the fact that he has executed them, and denuded himself of his interest, may rest entirely in his own breast. There is nothing like this in any other country in the world. Over the rest of Europe, independently of a Register, an interest in real property can only be transferred by an instrument executed by the parties before a notary public, and left in his care for the inspection of all persons interested in it. The legislature of this country has at various times since the reign of Henry VIII, shown its sense of the necessity of guarding against secret conveyances and charges, although hitherto no general measure has been adopted for that purpose. Judgments must be docketed or registered for public inspection before they bind the land. Unless annuities are inrolled or registered within a certain time, they are absolutely void. So an entry to the Custom-house, or registration, of every instrument conveying an interest in

British shipping, is a condition precedent to the operation of the transfer even against the grantor—a much more rigid enactment than any we propose respecting real property. Registers for real property have been long established in England for Middlesex and Yorkshire, containing one fifth of the population, and probably more than one-fifth of the wealth of that part of the United Kingdom, and defective as they are in their arrangements, they have been found beneficial, and no proposal has ever been made to abolish them. Sir, it is a curious and important fact, that no country in any part of the world, has ever established a public register of deeds affecting real property, and afterwards laid it aside. The experiment has been repeated often enough to justify the conclusion I draw from it, on the most cautious principles of induction. There has been a General Register for the whole of Ireland upwards of a century. Some sinecures have been fastened upon it, and the indexes have been imperfectly kept; but notwithstanding these abuses and defects, I believe there is no Irish Member who will not bear testimony to its general utility; and amidst the extravagant and factious cry for a repeal of the Union, no one in that country has been so extravagant or factious as to cry for a repeal of the Register. In Scotland there has been a General Register-office since the year 1617. It is the glory of the law of that country, and the boast of every Scotchman. I can say of my own knowledge, that it gives a feeling of security to purchasers and creditors, which in the unregistered counties of England is wholly unknown. Holland had the honour of setting the example to Europe of a public Register as well as of civil and religious liberty; and since the time of the Emperor Charles V., she has had this institution, to which some have ascribed a great portion of her prosperity. The institution has been adopted with various modifications, in France, in Switzerland, in the greatest part of Germany, in Sweden, in Norway, in Denmark, and in most of the States of Italy. It has travelled across the Atlantic, and it now flourishes, I believe, in all the States of the North American Union, and all his Majesty's Colonies in the West Indies and



America. And we are told, that the establishment of a General Register in England would be a dangerous innovation.

The next objection is one which I find greatly relied upon in certain meetings which have lately been held in the North, by anticipation, to petition against the Register Bill,—I mean, Expense. Now, Sir, I take it upon myself to declare, upon calculations that cannot deceive, that it will occasion no expense at all to the public, and that the expense to the parties will be extremely moderate, being overbalanced tenfold by the expenses which they will then avoid. Sir, I propose no sumptuous buildings, at least until they can be afforded out of the fair profits of the establishment. I denounce all sinecures; let efficient service be liberally rewarded, for so the public good requires; but let there be no pay except for efficient service, and let regulations be enacted to ensure the appointment of competent officers, and continued diligence and fidelity in all departments of the institution. Sir, I could show, that from very moderate fees for searches, for registering the deed, and for giving attested copies—that is to say about 10s. for a search, 1l. 5s. for registering a deed, and one half the charge now made by solicitors for attested copies,—a fund would be raised much more than sufficient to defray all the necessary expense of buildings, officers and other outgoings; so that the Register-office like the Post-office, while it is of the greatest use to individuals, may not only pay its own charges, but fairly contribute to the public revenue. The fees I have mentioned, in large transactions would not be felt;—and in a transaction of any magnitude, who is there that would not willingly give twenty times the amount, to be absolutely sure that his title never could be questioned? In small transactions the fees may be lowered or entirely waived, so that no one may complain. What are these fees, compared to the expenses now incurred by the machinery of terms for years?

A popular objection, of which I expect ample use to be made by some who oppose the measure, in truth on other grounds, is disclosure. I meet this with some apprehension, for it appeals to the imagination, and there is some difficulty in knowing how far the

impression which it makes will be removed by facts, however strong. Let me first correct a misconception which has gone abroad, that existing deeds are to be registered. The proposed measure is purely prospective, and all transactions prior to the establishment of the register will rest unrevealed. Even as to the future, disclosure is not essentially necessary to gain the chief objects of the institution. A register might be framed which would be open only to persons proving an interest to examine it. But, for my own part, I must acknowledge that disclosure seems to me to be a benefit instead of a drawback. With respect to men not in trade, there seems no reason why they should be allowed to appear to the world as owners of property which they have made away with. A mortgage by a country gentleman, to raise portions for younger children, or to defray the expense of an election, does not hurt his dignity or importance, and at present is well known in the neighbourhood as soon as it is executed. "Danger to commercial credit" has a more alarming sound; but here my case must be allowed to be triumphant. Who ought to be the best judges upon this point?—Surely, the great merchants and bankers of London. Who would suffer from disclosure, if it were dangerous to commercial credit?—The great merchants and bankers of London. Accordingly, the following question was circulated among the twenty-four most eminent merchants' and bankers' houses in London, without the smallest preconcert or regard to any circumstance, except the extent of their dealings, and their reputation in the world. Sir, the list will be found to contain the names of Thomas Wilson and Co.; Fletcher, Alexander, and Co.; Smith, Payne, and Smiths; Jones, Lloyd, and Co.; Grote, Prescott, and Co.; Williams, Deacon, and Co.; Robarts, Curtis, and Co.; Thompson, Bonar, and Co.; Masterman, and Co.; and Barnard, Dimsdale, and Co. The question was, "Do you consider that the disclosure which an open register would afford of mortgages and encumbrances, would be procuctive of more evil or good?" Their unanimous answer, in writing, signed by them respectively, is in these words:—"We think, upon general grounds, that any measure which tends to prevent misconception, and to secure accurate

information respecting the circumstances and property of commercial men, must, on the whole, produce more good than evil; nor do we see reason to apprehend any serious mischief from the disclosure which an open registry would afford of mortgages and encumbrances, inasmuch as we are confident that more mischief arises in the mercantile world from false appearances of property, and erroneous impressions as to the real circumstances of parties, than from any other cause whatever." But I can appeal to experience to show that this apprehended disclosure is a mere bugbear. In Scotland, the register of sasines may be inspected by all mankind, and no inconvenience has arisen from this publicity. I need not remind the House, that no country in Europe has advanced more rapidly in commerce and wealth than my native land. In Ireland all encumbrances upon any property may be known, and settlements, to be secure, must be registered; but no inconvenience has been felt. Need I draw the attention of the House to the West Riding of Yorkshire, where there is an open register, and where manufactures and trade, as well as agriculture, have probably flourished more than in any other part of England. It is a curious fact, that in Middlesex so little account do they make of disclosure, that the memorial, which is only required to state the parties and the premises, usually goes on to state the consideration and the uses, thereby publishing all the secrets of the deed. The disclosure made by memorialising annuities must be very disagreeable to both parties; for I believe no one would like it to be known that he is either grantor or grantee of a life-annuity; yet no one has proposed to repeal the Annuity Act. The registration of shipping has unquestionably been found very salutary in preventing false credit from being obtained. In the port of London it is a common practice for a tradesman, before he supplies stores to a ship, to send to the custom house to ascertain whether she has been mortgaged. It is a mistake to suppose that people inquire into the affairs of others from mere idle curiosity. There is an open register at Doctors' Commons of all wills proved in the diocese of London, or the province of Canterbury, for centuries, and any one will may be in-

spected for a shilling. I believe such an inspection is rarely made except on behalf of some one who in justice ought to be permitted to know the contents of the will. Are we told that flaws might be discovered in deeds, if any person might pore over them, or obtain copies of them? For one dispute about a title that arises from a defect in a deed, there are at least one hundred that arise from the defective framing of wills; yet wills have always been open to inspection, and no inconvenience has been felt from this publicity.

The only other objection which I have to mention, as it is the only other I am aware of, is the danger of failure to a purchaser or a mortgagee from defective search or registration. I allow, Sir, that if fatal mistakes could arise, the lowest degree of ordinary care being exercised, the objection would be insurmountable. But if the exercise of the lowest degree of ordinary care must effectually guard against all mistakes, the objection is removed. Now, that this may be easily accomplished, accords not only with reason, but experience. All that is to be done is to afford the means of ascertaining by search, what deeds and instruments have been registered respecting any particular property, and to provide a form, by observing which, a deed shall have the benefit of being considered registered. These are far less complicated and difficult operations than what are daily going on in the General Post Office, and in the Bank of England. With the defective indexes in Middlesex, Yorkshire, and Ireland, and in Scotland without any index at all, few or no mistakes have arisen, and the English and Irish cases respecting registration, to be found in the books, turn upon the doctrine of notice, and not on any mistake in the mode of search or registration. It may be remarked, that if registration is not made essential to the validity of a deed, and though unregistered it is valid as against the grantor, the instances must be very rare in which any question can arise touching the mode of registration. The fraud of concealing a deed may be committed by any one individual, without any accomplice. The fraud of executing a second deed, to defeat a deed imperfectly registered, can only be committed by several persons in combination, and with professional assistance. A fatal mistake can

only arise from the want of a low degree of ordinary care in the party himself, his agent, or the office. If it arise from his own gross negligence, he has himself alone to blame: if from that of his agent, he must seek his remedy in damages, as in other cases where an agent is guilty of a breach of duty; and if from that of the office, a remedy may be given to him against the office, or against the public, to whom the officer would be answerable with his sureties. Gross personal negligence can alone bring a loss without indemnity, and against a man's own gross personal negligence he has no right to be indemnified.

I will now proceed, with the permission of the House, shortly to give an outline of the particular plan of registration which I shall have the honour to propose, and which, after great deliberation and repeated discussions, has been unanimously recommended by the Commissioners. I am very desirous that the House and the public should bear in mind, that various parts of this plan are not essential to registration, and that they may be either omitted or varied, without affecting the principle of the measure. I propose that there shall be one General Register Office established in the Metropolis for the whole of England and Wales. Some individuals, and especially country attornies, profess a preference to a Register Office in every county or division of a county. You would thus have about sixty establishments instead of one. I may give a notion of the degree to which the expense of the whole would be increased, by mentioning an accurate calculation which has been made, showing that the expense of the General Metropolitan Office would be very little greater than the expense of the several offices now established in Middlesex, and the different divisions of Yorkshire. But the increased expense would be the least evil. It would be impossible to find officers of competent learning and skill for so many establishments; they would soon vary in their rules and practice, and great confusion would be produced. Premises comprised in one deed, or will, often lie in different counties, and the same instrument might require to be registered several times over in remote parts of England. In one Metropolitan Register Office there must

be a great concentration of talent and experience, and there being no waste of power, the work that is to be done will require much less machinery, and much fewer hands. Uniformity of practice must necessarily prevail. The head of the Register Office may be a gentleman of high eminence in the profession. He may have a sort of judicial authority vested in him respecting amendments, subject to an appeal to one of the Courts at Westminster; and regulations for the details of registration may from time to time be made, repealed, or varied by him, with the concurrence of the Lord Chancellor and the Judges. It must be an unspeakable advantage to be able to make all the searches that can be necessary respecting any title under one roof. A search for judgments must now be made in London, on a country purchase, and not unfrequently a search for probates or administrations—and it will be easy to make searches for deeds at the same time. It is a mistake to suppose that a London agent must be employed for that purpose. Every country solicitor will be allowed to correspond directly with the Register Office through the post, both for directing searches and the registration of deeds. England may now be considered as one great city, and the communication between many remote places and London is easier than with the county-town. Railroads are not entirely to be left out of consideration; as there is reason to think that in a few years London may not be more than a few hours distant from any part of the kingdom, the charges may easily be equalized without consideration of distance, so that registration for Cumberland or Cornwall may not be more expensive than for Surrey or Essex. Next comes the mode of registration. Shall it be by memorial, inrolment, or deposit? The memorial is intended only to give notice, that there is a deed between certain parties affecting certain premises; so that its production may be required from the vendor or mortgager. The plan of memorial, though plausible, seems to me objectionable. To prepare the memorial requires some skill, and we have ascertained that the expense of preparing it in Middlesex exceeds what would be the average expense of making a full copy of the deed, which

requires only manual labour; and it seems much better, that all the contents of the deed should at once be open at the public office to the person making the search. Inrolment, therefore, I prefer to memorial. But the deposit of the original deed, executed by the parties, would, in my opinion, be best of all. If any party thinks his deeds are safer in his own strong box, or at his attorney's, than they would be in the Register-office, he has only to execute a duplicate. Now, there being no stamp imposed upon this, it will cost no more than a copy, which I have shown costs less than a memorial. Thus, without any additional expense, and without any risk or privation to the parties, an original of every deed may be deposited at the office. The building may easily be made fire-proof, and I hope, in spite of Swing and his adherents, that it may be effectually guarded against the fury of a mob; but if, by some accident or public convulsion, the Register-office should be destroyed, the duplicates in the possession of the parties would remain, and titles would be at least in as good a situation as before registration was established. It would lead me into too tiresome a detail if I were to point out the many collateral advantages which would arise from the deposit of the original deeds of the Register-office—of which, preventing the forging and falsification of deeds would not be the least. I should have observed, that the attorney always charges a fair copy to keep, although such copy is seldom made; and this item alone, in a conveyancing bill, for which hereafter there could be no pretext, would more than cover the expense of what I suggest. If deeds are shortened, as I sanguinely hope soon to see them, the expense of a duplicate would be too trifling to be regarded by the most miserly.

The next consideration is, what instruments shall be registered? On this point, different states have acted differently. In some the registration is confined to transactions *inter vivos*; and in others, hypothecations or mortgages only are registered, and not absolute sales. But a register cannot be perfect unless it embraces all written instruments which in any way affect the title to Real Property. I therefore think, that the bill should extend to every deed

or writing which creates any estate at law or in equity, or passes any interest in land, or gives any lien upon it. Thus, executory contracts ought to be registered, as well as deeds, wills, commissions of bankrupt, &c.; but, to obviate this inconvenience, permission may be given, that the vendor may grant a caveat, whereby no deed or instrument touching the premises can be registered within a certain time, unless in favour of the purchaser. This will be put upon the register, and will effectually protect the purchaser and others, while it is in force. The same expedient may be resorted to for the purpose of protecting a purchaser in the interval between the search and the time when the purchase deed is registered. This will completely obviate the danger of a subsequent deed from the vendor, in favour of another person, being fraudulently registered first, and will avoid the necessity of fixing any time during which a deed shall absolutely prevail before it is registered. Upon registration of the deed the caveat has performed its functions, and a certificate of the act will be the warrant for payment of the purchase-money. I ought to mention, that it is not intended that surrenders, or any instruments respecting copyhold estates, which now appear upon the Court rolls, should be included in the General Register. But if a lien for purchase-money is to be claimed, it must be put upon the register; and, above all, Crown debts and obligations must be registered, or they shall not bind the land. A grievance of the most serious description is now experienced from the land of any person indebted, or under obligation to the Crown, being bound, although there are no means of knowing who is so indebted, or who is under such obligation. How the grievance or abuse (for so I must call it) should have been so long endured, is to me, I own, inexplicable. If there be any suspicion that a man who wishes to sell or charge his estate is a Crown debtor, there are various Government offices at which some imperfect information may be irregularly obtained. But it not unfrequently happens that a man has given bond to the Crown as surety, or has in some way received Government money into his hands, without the fact being suspected by any one; and at present



no man can certainly tell that the person from whom he purchases an estate may not be in this situation. It follows, that the day after the purchaser has taken possession, or fifty years after he and his family have been in undisputed enjoyment, an extent may come in without the slightest previous notice ; the superior title of the Crown admits of no question, and the estate is sold to pay the Crown debt. It is absurd to suppose, that a registration of Crown debts would be any infringement on the prerogative of the Crown. Let the Crown, for the public good, have all its remedies against its debtors ; but let not those remedies, without doing any good to the public, work the ruin of innocent individuals, who are not even chargeable with the least particle of incaution. I can see no difficulty in a list being kept of persons indebted or under obligation to the Crown. The parties are more likely to object than the Crown, but they can have no laudable motive for concealment, and justice imperiously requires that their situation should be known.

The most material consideration in the plan of a new Register is the framing of the Index. Indeed, the difficulty of showing with ease and accuracy all registered documents concerning any particular property is, in my humble judgment, the only serious objection to a Register ; and the true question is, whether this difficulty can be surmounted ? How they have hitherto contrived to get on in Scotland without an Index, I confess I do not comprehend. Considerable inconvenience has been felt, and an Index is now in preparation under the superintendence of a gentleman of great learning and ingenuity, who has long presided over the establishment at Edinburgh. In the English and Irish Registers, the Indexes are alphabetical ; but the labour and expense of searching them are often very burthensome, from there being many persons of the same name, and the same person sometimes conveying a great many separate tenements,—as a speculator in houses, who buys ground and builds new streets. Where there is a purchase to be made from a man of a given name, all deeds or memorials appearing in the Index with a man of this name as the grantor, must be inspected. I have been told of a search in the Middlesex Register

which lasted three months, and cost above 100*l*. A plan has been under consideration, of having a general survey of the kingdom, with maps on a large scale, showing the minutest subdivision of property, with numbers to be referred to in the Deed and affixed to the Index ; but beside the objection of expense, the boundaries of property are often so indistinct, and shift so often, that it was thought, that the parcels supposed to be designated by numbers could not be certainly known. This plan has been beneficially followed in the Bedford Level, an agricultural district, where the boundaries are distinct, and are seldom changed ; but, in my opinion, it is wholly inapplicable to a great kingdom. The Index which this Bill proposes, proceeds upon a classification of deeds ; the first registered deed respecting any property being considered the root of the title. This will be registered under a particular symbol, and all subsequent deeds respecting the same interests will be registered under the same symbol. By referring to the symbol in the Index, all the deeds respecting the property may at once be found. Provision will be made for adding to or taking from the property contained in the first deed, and the Index being kept somewhat on the principles of book-keeping, no search will, in general, be required beyond a certified copy of the entries under the symbol. The essentials of registration will be an entry of the deed in the Index, under the proper symbol, with the date of the deed, the date of registration, and the book or compartment in the office where the deed may be found. Various regulations will be introduced respecting wills, legacies, commissions of bankrupt, &c. With these details I will not fatigue the House. Where such a vast variety of objects must be provided for, it is in vain, and it would be unreasonable, to expect that the enactments of the Bill can be few, or that they should appear simple to persons unacquainted with the subject. There is no royal road to astronomy ; and abstruse legal discussions can only be intelligible to lawyers. The specification of a patent is reckoned sufficient if the machine can be made from it by an engineer, although it should be above the comprehension of all the Members of both

Houses of Parliament. I therefore hope that this Bill will not be condemned by any lay Lord, Knight, or Burgess, merely because it may contain some clauses which he does not fully comprehend. I can assure the House that the utmost pains have been taken to make it as short and as simple as possible. There is one point which I must bring under the notice of the House, the importance of which will at once be seen by the hon. Member for Boroughbridge, and upon which, in my judgment, the success of the measure, in a great degree, depends; that is, whether the preference of a registered to an unregistered deed shall be taken away by evidence that the party claiming under the registered deed had notice of the unregistered deed. The Commissioners, who agreed unanimously in favour of a Register, were nearly equally divided upon this point; but I am bound to say, that I have a very strong opinion, with the majority, against giving effect to notice, either constructive or actual, to defeat a registered title. I purpose to bring in the Bill with a clause to this effect. The reasons for the contrary opinion will deserve to be weighed with all respect; but I think the party who has neglected to register his deed, has no cause to complain if he loses his estate. "*Vigilantibus non dormientibus subveniunt leges.*" It is of the greatest advantage to have a broad rule, not subject to exceptions, which fritter it away, and involve parties in constant litigation. To defeat a registered deed by mere constructive notice, shocks every one; and the boundary between actual and constructive notice is often only imaginary. If the registered title does not rigidly prevail, you subject every man who purchases an estate, to the loss of it by fabricated parol evidence, or the caprice of a Judge. Lord Hardwicke, and the greatest Equity Judges, have lamented that any effect has been given to notice under the present local Register Acts; and it seems to me that their beneficial effects have been thereby materially impaired. The example of other countries leads to the same result. The Chancellor D'Aguesseau, having consulted all the Parliaments of France upon a question the same in principle, they all, with one exception, agreed that notice was to be disregarded. In Scotland the rule is rigid, that the re-

gistered deed shall prevail, notwithstanding notice of a prior unregistered deed; and no inconvenience has ever arisen from it. The Code Napoleon lays down the same rule. In England, even notice of a contract void by the Statute of Frauds operates nothing; the title of a purchaser cannot be impeached by showing that he had notice of a voluntary settlement; and it has been expressly determined, that under the Ship Register Acts notice of an unregistered bill of sale is quite immaterial. The vital principle of a General Register is, that title shall entirely depend upon the written documents entered upon the Register. How is this consistent with letting in the doctrine of notice? Fraud will still be open to the cognizance of a Court of Equity; and a contrivance between two or more to prevent or deny the registration of a deed, that a deed subsequently executed may have priority, would be the subject of an indictment at Common Law for a conspiracy. A remedy may likewise be given by action, without affecting the registered title. Sir, I have been asked whether any provision is to be made in this Bill for preserving evidence of pedigree. The law upon this subject is most defective. It is easier in any old family to prove a descent five hundred years ago, than in the beginning of the last century; and there has been since little improvement in this respect. There is no public evidence of pedigree, except from parish registers, which have been kept with the most shameful negligence, and which do not comprehend those who dissent from the Church of England,—a very large proportion of his Majesty's subjects. The parish register, in recording baptisms, does not profess to give the time of birth, which is often so important, and it contains nothing to identify families beside similarity of name. Sir, there ought certainly to be in this country, as there is in France, and almost every where on the Continent of Europe, a civil register of births, marriages and deaths, comprehending persons of all religions, and of no religion, if unhappily there are any such—with a description of the parties by residence, profession, or parentage, to leave no doubt as to their identity. This measure, however, is essentially different from a register of deeds, and must be reserved for future consideration. It

will be greatly facilitated by the establishment of a General Register Office. Copies of the district registers of births, marriages and deaths, would be transmitted to the General Register Office,—and in one place all searches of all sorts respecting title and pedigree would take place for the whole kingdom. Sir, when this Bill has been brought in, it must be judged of by its merits, and the House will act upon their own opinion in adopting or rejecting it; but in moving for leave to bring it in, that it may be submitted to discussion, I think I may fairly mention some of the great names by whose authority the measure is recommended. Lord Hale, and the Commissioners appointed to inquire into the state of the Law in the time of the Commonwealth, and who suggested some of the noblest improvements which the law has undergone, prepared a Bill for the establishment of a General Register. They proposed to erect an Office in every County, the only mode in which the measure was then practicable, when communication with London was so slow and uncertain. After the Restoration, and when filling the highest judicial offices, Lord Hale continued to recommend the measure with unabated zeal. When local registers had been partially established, and were found beneficial, Mr. Justice Blackstone, and other sages of the law, regretted that they were not universally established. Upon several occasions it has been proposed in this House to establish registers in every county; but as the Bills introduced for this purpose did not remove the defects in the local registers already established, they did not pass; although the principle of registration appears to have been warmly supported by Sir Samuel Romilly, and the greatest men who then sat in Parliament. Since the second report of the Real Property Commissioners was published, recommending the plan of registration which is the subject of this Bill, I have the satisfaction to say, that it has met with the approbation of the late Lord Chancellor, of the present Lord Chancellor, of the Lord Chief Justice of the King's Bench, of the Lord Chief Justice of the Common Pleas, of the Lord Chief Baron of the Court of Exchequer, and of a considerable majority of the Judges. There was an illustrious Ex-Chancellor who has declared a decided hostility to the mea-

sure. I need not mention that I mean the venerable Earl of Eldon ; but I must use the freedom to say, notwithstanding the reverence with which I have been accustomed to regard his judgments, that I think he knows better how the law is, than how it ought to be. He has devoted his life so entirely to the task, first of practising and then of interpreting it, that he has left himself but little leisure to consider the improvements of which it is susceptible. He regards all change in our jurisprudence as unnecessary and mischievous ; and perhaps he is of opinion that a General Register is a modern invention for abridging labour, which ought to be prohibited along with power-looms and thrashing machines. If any weight is to be given to the publications which have issued from the press, public opinion is strongly in favour of the measure. Many able pamphlets have been published in support of it, and only one, that I am aware of, against it. But there is a formidable body of opponents, against whose influence I feel it my duty to caution the House : I mean the Solicitors. In that branch of the profession there are many men of high honour and liberality, who would be ready to sacrifice their private advantage to the public good. Many of these have communicated valuable information to us, and are ready cordially to co-operate in the establishment of a General Register.

But a notion has gone abroad among solicitors, chiefly in the country, that this measure will materially interfere with their professional profits ; and I have reason to know that on this ground they are prepared to oppose it, and to get up petitions against it. In these petitions we shall hear nothing of loss of profits to solicitors, but a great deal of “innovation, expense, disclosure, and danger.” Many Members of this House, and particularly country gentlemen, are so much under the influence of their solicitors, that I cannot look upon their opposition without some dismay. But I must entreat Honourable Members to judge for themselves ; I would ask such as have been concerned in sales or mortgages, to refresh their memories by reading the bills of these solicitors. No blame is to be imputed for making such charges,

which arise, not from the fault of individuals, but from the defective state of the law itself. But the burthen thrown upon the landed interest by the enormous expense of the present mode of conveyancing, is a grievous tax upon them, which they ought to submit to no longer. The whole expense, whether nominally paid by the vendor or purchaser, obviously by so much lessens the value of the subject sold. In mortgages, if the law charges are added to the interest or subtracted from the sum borrowed, the harassed mortgager will often find, that instead of four or five, he pays six or seven per cent. for the loan. The expense of transferring funded property is one-eighth per cent., and the whole proceeding is completed in a few minutes. It would be vain to expect that Real Property can ever be transferred with the same despatch and economy; but I entertain the firmest conviction, that the delay and expense now experienced might be most materially diminished, and that the first step to be taken for this purpose is the establishment of a General Register. Another mode may be adopted of remunerating the solicitors, who ought always to be treated as belonging to a liberal profession; but it is desirable that the recompence they receive should depend upon the confidence reposed in them, and the skill and assiduity they display in any particular transaction: not upon the length of the deeds, which without personal trouble or responsibility, they procure to be drawn by a conveyancer and engrossed by a stationer.

I have now, Sir, sufficiently explained the nature of the plan which I have proposed, to enable the House to decide whether leave should be given to bring in the Bill. I will venture to make one remark with some confidence,—that the measure must either be at once adopted for the whole of England and Wales, or entirely rejected. It has been suggested, I will not say insidiously, that a partial trial should first be made of the new system of Registration, either in one of the register counties, or in a single maiden county, where no register has yet been established. Sir, this would not be a fair trial, and it ought not to be attempted: it would be effectually thwarted by the enemies of the measure. The object is,

to change the existing system of conveyancing, and the habits of professional men. This cannot be effected unless the new system be universally introduced. Therefore, Sir, thanking the House for its indulgence, and not further trespassing on its patience by any recapitulation of the topics which I have touched upon, I will conclude by moving for leave to bring in a "Bill for establishing a General Register for all deeds and instruments affecting Real Property in England and Wales."

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After a short debate in which Sir E. Sugden, Sir C. Wetherell, Mr. Hume, Sir T. Denman, and Mr. Freshfield took part, Mr. John Campbell replied.

#### R E P L Y.

Mr. JOHN CAMPBELL:—As I do not find that there is any opposition to bringing in the Bill, although some hostility is threatened to it in its future stages, I shall have to trouble the House very briefly in reply. I should regret exceedingly if it were thought that I had reflected upon the solicitors as a body; but I considered it my duty to throw out a caution to some of them, to consider whether, in the steps they are taking to excite a prejudice against the establishment of a General Register, they are not actuated by an exaggerated apprehension that it will materially interfere with their own gains. And I thought I might, without offence, offer a suggestion (which I am sure, if it could be carried into effect, would be most agreeable to my Honourable Friend, the Member for Penrhyn, who is so eminent in this department of the profession), that another mode should be adopted for remunerating the valuable services of solicitors employed in conveyancing, whereby they may no longer appear to have an interest against their duty. Considering the unbounded confidence reposed in them on the most important occasions of life, there can be no doubt that it is for the public advantage that their remuneration, by whatever rule it may



be determined, should be ample. The only argument as yet brought forward against the measure itself is the apprehended expense of erecting the building in which the deeds are to be deposited; and I am happy to be able to tranquillize the fears of the hon. Member for Borough-bridge upon this subject. We do not mean that the Register Office in London should be one of the wonders of the world, like the tomb raised by Queen Artemesia to her husband Mausolus,—to which my Honourable and Learned Friend has been pleased to compare it,—but should be composed of plain brick, mortar, and iron; and I can tell him, that of these materials a commodious, substantial, fire-proof building, sufficient to contain all the deeds to be executed in England for 100 years to come, may, by estimate, be constructed for the sum of 20,000*l*. Sir, I feel as much as my Honourable and Learned Friend, the Member for Weymouth, the importance of this measure being supported by Government; and I frankly own, that unless it be cordially supported by Government, I despair of its success. But I differ from him as to the indispensable necessity of Government being pledged to it before it is introduced into this House. Under the peculiar circumstances in which the present Government is placed, obliged suddenly to deliberate and decide upon many important measures of urgent and immediate necessity, great and inconvenient delay must have arisen in bringing forward the Bill for a General Register, if it had been previously discussed in the Cabinet, and formally submitted to the law-officers of the Crown. Till it shall be determined whether the unanimous recommendation of the Real Property Commissioners upon this subject shall be adopted by the Legislature, they are at a loss what course to pursue; for they consider this as the basis of all reform; and upon its adoption or rejection must, in a great degree, depend the ulterior measures for the improvement of the law which they may feel it their duty to suggest. It gave me the most sincere pleasure to hear that my Honourable and Learned Friend, the Attorney-general, as an individual, is favourable to the Bill; and I was much gratified by the liberal and handsome tone in which he spoke of the manner in which it has been brought forward. I do confi-

dently expect, that upon examination it will be found to deserve, and that it will receive. the approbation of his Majesty's Ministers, and of the enlightened individuals of all parties ; that it will pass both Houses of Parliament with applause ; and that it will be received with satisfaction by the country. For myself, after what has passed, I may be allowed to say, that my only motive in proposing it is a sincere and ardent desire to improve the institutions of my country. This is my ambition ; for this I have made some sacrifices, and I am ready to make more ; and I cannot help thinking that this ambition is nobler, and gives a better chance of lasting fame than the common-place longing after office and professional advancement. Sir, I have only further to observe, that instead of urging forward the measure with precipitation, I am anxious that the most ample time should be allowed to consider and discuss it. Therefore, if leave be given to bring in the Bill, I propose, that after being read a first time, it shall be printed ; that it shall be circulated as generally as possible, so that not only Members of this House, but all classes of his Majesty's subjects, may have an opportunity of objecting to its principle or its details ; and that the second reading, when its fate will probably be decided, shall be fixed for a distant day.

[Without a division leave was given to bring in the Bill.]

**SPEECH FOR THE CROWN**  
**ON THE TRIAL OF**  
**JAMES THOMAS EARL OF CARDIGAN,**  
**BEFORE THE**  
**LORD HIGH STEWARD AND THE HOUSE OF LORDS.**

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*House of Lords.\**

Die Martis, 16 Februarii 1841.

THE Lord Denman, in the absence of the Lord Chancellor, entered the House in his robes, preceded by the Serjeant with the mace, Black Rod carrying the Lord High Steward's staff, and Garter with his sceptre, and took his seat on the Woolsack, as Lord Speaker.

After prayers the roll of Peers was called over by the Clerk Assistant beginning with the junior Baron.

The Clerk of the Crown in Chancery and the Deputy Clerk of the Crown in the Queen's Bench then made three reverences, and the Clerk of the Crown in Chancery, on his knee, delivered the Commission to the Lord Speaker, who gave it to the Deputy Clerk of the Crown in the Queen's Bench, who received it on his knee; both the clerks then retired, with like reverences, to the table.

After proclamation made for silence,—

*Lord Speaker.* Let her Majesty's Commission be read, and let all persons rise and be uncovered while the same is read.

The Commission was read by the Deputy Clerk of the Crown

\* From Mr. Gurney's account of the trial published by authority of the House of Lords.

in the Queen's Bench, appointing Thomas Lord Denman as Lord High Steward.

Then Garter and the Gentleman Usher of the Black Rod, having made their reverences, proceeded to the woolsack, and having taken their places on the right hand of the Lord High Steward, both holding the white staff, presented it on their knees to his Grace.

His Grace then rose, and, having made reverence to the throne, took his seat in the chair of state placed on the upper step but one of the throne, and delivered the staff to the Gentleman Usher of the Black Rod.

Proclamation for silence was made by the Serjeant-at-Arms.

The writ of Certiorari to remove the indictment, with the return thereto, and the record of the indictment, were read by the Deputy Clerk of the Crown in the Queen's Bench.

Proclamation was made by the Serjeant-at-Arms for the Yeoman Usher to bring James Thomas Earl of Cardigan to the bar.

The Earl of Cardigan was brought to the bar by the Yeoman Usher, and on approaching it made three reverences, and knelt till directed by the Lord High Steward to rise; then he made three reverences, one to his Grace the Lord High Steward, and one to the Peers on either side, who returned the same; his Lordship was then conducted to the stool provided for him within the bar, near to his Lordship's counsel.

*Lord High Steward.*—My Lord Cardigan, your Lordship stands at the bar charged with the offence of firing with a loaded pistol at Harvey Garnett Phipps Tuckett with intent to murder him; in a second count you are charged with firing with intent to maim and disable him; and in a third count you are charged with firing with intent to do him some grievous bodily harm. Your Lordship will now be arraigned on that indictment.

Then the Earl of Cardigan was arraigned by the Deputy Clerk of the Crown in the Queen's Bench in the usual manner.

*Deputy Clerk of the Crown.*—How say you, my Lord, are you guilty of the felony with which you stand charged, or Not guilty?

*Earl of Cardigan.*—Not guilty, my Lords.

*Deputy Clerk of the Crown.*—How will your Lordship be tried?

*Earl of Cardigan.*—By my Peers.

*Deputy Clerk of the Crown.*—God send your Lordship a good deliverance.

His Grace the Lord High Steward, by leave of the Court, removed to the table, preceded by Garter and Black Rod; and his Grace being seated, Black Rod took his seat on a stool at the corner of the table on his Grace's right hand, holding the white staff, Garter on a stool on Black Rod's right, and the Serjeant at the lower end of the table on the same side.

The Indictment having been stated by the Queen's Counsel for the Crown, Sir John Campbell, Attorney General, spoke as follows :—

My Lords, I have the honour to attend you upon this occasion as Attorney General for her Majesty, to lay before you the circumstances of this case,—without any object or wish on my part, except that I may humbly assist your Lordships in coming to a right conclusion upon it according to its merits.

My Lords, an indictment has been found against a Peer of the realm by a Grand Jury of the country, charging him with a felony, the punishment for which is transportation or imprisonment. That indictment has been removed before your Lordships, at the request of the noble prisoner,—most properly made,—for an inferior court had no jurisdiction to try it. This charge being upon the face of it so serious, it would not have been satisfactory if it had gone off without any inquiry; and the policeman, who was upon this occasion bound over to prosecute, had fulfilled the condition of his recognizance by appearing at the Central Criminal Court and preferring the indictment.

My Lords, in the course of this trial it is possible that questions of magnitude upon the construction of Acts of Parliament, and respecting the privileges of the peerage, may arise,—which it is of great importance to this House, to the Crown, and to the community should be deliberately discussed. According to all the precedents that can be found, whenever there has been a Peer tried in Parlia-

ment the prosecution has been conducted by the law officers of the Crown.

Fortunately, my Lords, we have no living memory upon this subject. It is now sixty-four years since any proceeding of this sort has taken place; and I am rejoiced to think, my Lords, that the charge against the noble prisoner at the bar does not imply any degree of moral turpitude, and that if he should be found guilty the conviction will reflect no lasting discredit upon the illustrious order to which he belongs. But, my Lords, it seems to me that he clearly has been guilty of a breach of the statute law of the realm, which this and all courts of justice are bound to respect and enforce. Your Lordships are not sitting here as a court of honour, or as a branch of the legislature; your Lordships are sitting here as a Court of justice,—bound by the rules of law,—and under a sanction as sacred as that of an oath.

My Lords, the indictment against the Earl of Cardigan is framed upon an Act of Parliament which was passed in the first year of the reign of her present Majesty Queen Victoria; it charges his Lordship with having shot at Captain Harvey Tuckett with the several intents that are set forth in the different counts. I think, my Lords, that in opening the case to your Lordships I shall best discharge my duty by presenting to you a brief history of the enactments of the legislature upon this subject.

By the common law of England, where death did not ensue, no personal violence amounted to more than a misdemeanor, and if the wounded party did not die within a year and a day no felony was committed.

The first Act of Parliament that created a felony where death did not ensue was the fifth of Henry the Fourth, cap. 5, whereby certain personal injuries without death were made felonies, but with benefit of clergy. Then, my Lords, came the Coventry Act, in the twenty-second and twenty-third of Charles the Second, whereby any person lying in wait for, and wounding with intent to maim or disfigure, was guilty of felony, without benefit of clergy. Under both of those statutes no offence was committed unless a wound were inflicted;

and it was not until the ninth of George the First, commonly called the Black Act, that an attempt upon life without wounding was made a felony.

My Lords, by that Act of Parliament it was enacted, that “ if  
“ any person shall wilfully and maliciously shoot at any person in  
“ any dwelling-house or other place,” he shall be guilty of felony,  
without benefit of clergy, although no wound were inflicted. But,  
my Lords, it was determined upon that statute (of which, in fairness  
to the noble prisoner, it is my duty to remind your Lordships), that  
unless the case was one in which, if death had ensued, it would  
have amounted to murder, no offence was committed. That was  
determined in the case of the King v. Gastineaux, which is reported  
in the first volume of Leach’s Crown Law, page 417. In that case  
the law was thus laid down :—“ The offence charged in this indict-  
“ ment is described by the statute on which it is framed in very  
“ few and clear words, which are, ‘ that if any person or persons  
“ ‘ shall wilfully and maliciously shoot at any person in any dwell-  
“ ‘ ing-house or other place he shall be adjudged guilty of felony,  
“ ‘ without benefit of clergy.’ The word *maliciously* is made to  
“ constitute the very essence of this crime ; no act of shooting,  
“ therefore, will amount, under this statute, to a capital offence,  
“ unless it be accompanied with such circumstances as in construc-  
“ tion of law would have amounted to the crime of murder if death  
“ had ensued from such act. This proposition most clearly and  
“ unavoidably results from the legal interpretation of the word  
“ *maliciously*, as applied to this subject ; for there is no species of  
“ homicide in which malice forms any ingredient but that of mur-  
“ der ; and it follows that neither an accidental shooting, nor a  
“ shooting in the transport of passion, excited by such a degree of  
“ provocation as will reduce homicide to the offence of manslaughter,  
“ are within the meaning of the statute ; for, from both of these  
“ cases the law excludes every idea of malice.”

My Lords, the law continued on this footing until an Act of  
Parliament was passed in the forty-third year of the reign of King  
George III., which is commonly called Lord Ellenborough’s Act.

That did not repeal the Black Act, but considerably extended its provisions ; and amongst other enactments it contains this : “ That if  
“ any person shall wilfully and maliciously and unlawfully shoot at  
“ any of his Majesty’s subjects, with intent in so doing, or by  
“ means thereof, to murder or rob, or to maim, disfigure, or disable such his Majesty’s subject or subjects, or with intent to do some  
“ other grievous bodily harm to such his Majesty’s subject or  
“ subjects,” he shall be guilty of felony, without benefit of clergy. This act, however, contains an express proviso, “ that if it shall  
“ appear, upon the trial of any person or persons indicted for the  
“ wilfully, maliciously, and unlawfully shooting at any of his  
“ Majesty’s subjects, that if death had ensued therefrom it would  
“ not have amounted to murder, the person indicted must be  
“ acquitted.” Your Lordships will observe by this Act of Parliament it is a capital offence to shoot at, with intent to murder, or with intent to maim, disfigure, or disable, or do some grievous bodily harm, but that it is a case within the statute, only supposing that if death had ensued it would have amounted to the crime of murder.

The next statute upon this subject is the ninth of George IV., cap. 21., which, I believe, is generally called Lord Lansdowne’s Act ; that noble Lord, as Secretary of State for the Home Department, having introduced it into Parliament. It is intituled “ An Act to consolidate and amend the statutes relating to offences against the person.” It repeals the Black Act, and it repeals Lord Ellenborough’s Act, but it contains similar provisions to those of Lord Ellenborough’s Act. By the eleventh section it is enacted, “ that if any person shall unlawfully and maliciously shoot at any person, with intent to murder, he shall suffer death as a felon ;” and by the twelfth section it is enacted, “ that if any person unlawfully and maliciously shall shoot at any person, with intent to maim, disfigure, or disable him, or do some other grievous bodily harm, he shall suffer death as a felon.” But then, my Lords, this Act of Parliament contained expressly the same proviso as was inserted in Lord Ellenborough’s Act, that if, upon the trial, it shall turn out that if



death had ensued the case would not have amounted to murder, the prisoner shall be acquitted. It was still a capital offence to shoot at, with intent to murder, or with intent to maim, disfigure, or do grievous bodily harm, although no wound were inflicted.

Things remained upon this footing until the Act passed upon which this indictment is framed. This Act received the royal assent on the 17th of July, 1837. It is the first of Victoria, chapter 85, intituled "An act to amend the laws relating to offences against the person." The preamble recites, "Whereas it is expedient to amend so much of an Act passed in the ninth year of the reign of King George the Fourth as relates to any person who shall unlawfully and maliciously shoot at any person with any of the intents therein mentioned." It repeals the ninth of George the Fourth, *pro tanto*; and then by the second section, it enacts, "that whosoever shall stab, cut, or wound any person, or shall, by any means whatsoever, cause to any person any bodily injury dangerous to life, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony, and, being convicted thereof, shall suffer death." Therefore, to shoot at, and to give a wound dangerous to life, remains a capital offence; but shooting at, where no wound is inflicted, is no longer a capital offence, and is a felony only, liable to be punished with transportation or imprisonment, whether the intent be to commit murder, or to maim or disable, or do any other grievous bodily harm.

By the third section it is enacted, "that whosoever shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." Then, my Lords, by the fourth section it is enacted, "that whosoever unlawfully and maliciously shall shoot at any

“person, or by drawing a trigger attempt to discharge any kind of  
“loaded arms at any person, with intent to maim, disfigure, or dis-  
“able such person, or to do some other grievous bodily harm to  
“such person, he shall be guilty of felony, and, being convicted  
“thereof, shall be liable” to the same punishment provided by the  
third section of the Act of Parliament.

My Lords, this Act contains no such proviso as you find in Lord Ellenborough’s Act, or in that of the ninth of George the Fourth,—a circumstance which it will be material for your Lordships to bear in mind when you come to deliberate upon the second and third counts of this indictment.

My Lords, I am happy to say that this indictment contains no count upon the capital charge. A wound was inflicted, but the prosecutor, very properly, has restricted the charge to firing at,—with different intents,—without alleging that a wound dangerous to life was inflicted. The first count of the indictment charges that the Noble Lord shot at Captain Tuckett with intent, in the language of the law, to commit the crime of murder; the second count of the indictment charges his Lordship with the same act, with intent to maim and disable; the third count charges him with the same act, with the intent to do some grievous bodily harm. Now, it will be for your Lordships to say whether, upon the facts which I shall shortly detail to you, and which I am instructed will be clearly made out in evidence, each and every one of these counts must not be considered as fully established.

My Lords, upon the 12th day of September last the Earl of Cardigan fought a duel with pistols, on Wimbledon Common, with Captain Harvey Tuckett, and wounded him at the second exchange of shots. It will appear before your Lordships, that at about five o’clock in the afternoon of that day two carriages were seen to come in opposite directions to the neighbourhood of Wimbledon Common, and a party alighted from each. It was evident to those who observed what was taking place that a duel was in contemplation. The parties came to a part of Wimbledon Common between the road that leads by Earl Spencer’s park and a windmill standing

upon the top of the common. The seconds first took possession of the ground, and made the usual preparations. The principals, the Earl of Cardigan and Captain Tuckett, were then placed at a distance of about twelve yards from each other: they exchanged shots without effect; they received from their seconds each another pistol; they again fired, and Captain Tuckett was wounded by Lord Cardigan. There came up, almost immediately, Mr. Dann, who occupies the mill to which I have referred, and his son, with Sir James Anderson, a surgeon, who had been standing close by. The wound was examined; it bled profusely; but most fortunately, and I believe no one rejoices in that more than the Earl of Cardigan, it proved not to be of a dangerous nature. The parties were all removed by the miller, who was a constable, and took them into custody. The wound was further examined at his house, and Sir James Anderson pressed that he might be at liberty to take Captain Tuckett to his house in London; which was immediately acceded to, upon his promising to appear, when he had recovered, before the magistrates.

The miller retained the Earl of Cardigan, and his second, Captain Douglas, in custody. Captain Douglas was the second of the Earl of Cardigan, and Captain Wainwright the second of Captain Tuckett. The Earl of Cardigan had still a pistol in his hand when the miller approached. There were two cases of pistols on the ground, one with the crest of the Earl of Cardigan upon it, which he claimed as being his property. The party were conducted before the magistrates at Wandsworth, and, upon alighting from his carriage, Lord Cardigan made use of these words, "I have fought a duel, and hit my man, I believe not seriously." He then, pointing to Captain Douglas, said, "This gentleman is also a prisoner, and my second." He was asked whether the person that he had hit was Captain Reynolds; upon which he said, "Do you think I would condescend to fight with one of my own officers?" His Lordship was compelled by the magistrates to enter into a recognizance to appear when called for, which he did from time to time, till at last the matter was sent to the Central Criminal Court.

My Lords, the witnesses whom I shall call before you are the miller, his wife, and his son, with a policeman of the name of Busain, who was at the station-house, and who will speak to the declarations made by Lord Cardigan, and what then took place. I shall offer no evidence, and I can offer no evidence, before your Lordships, respecting the origin of the quarrel. Captain Douglas is to take his trial for this offence; he, as your Lordships would observe, is jointly indicted with the Earl of Cardigan. A bill of indictment was also preferred against Captain Tuckett and Captain Wainwright; it was thrown out by the Grand Jury, but, as your Lordships well know, they are still liable to be tried, and it would not be decorous that I should summon them before your Lordships to give evidence which might afterwards be turned against themselves. I shall call before your Lordships Sir James Anderson, who has hitherto spoken freely upon the subject, and, I suppose, will make now no objection to state to your Lordships all which fell within his observation.

Now, my Lords, upon these facts it will be for your Lordships to say whether all the counts in the indictment are not fully proved and supported. My Lords, with regard to the first, it is painful to use the language which it necessarily employs; but it will be for your Lordships to say whether, in point of law, the Earl of Cardigan did not shoot at Captain Tuckett with intent to commit that crime which is there alleged. My Lords, I at once acquit the Earl of Cardigan of anything unfair in the conduct of this duel. Something has been said respecting his Lordship's pistols having rifle barrels, and those of Captain Tuckett not having rifle barrels. My Lords, however that may have been, I have the most firm conviction that nothing but what was fair and honourable was intended, and that the Earl of Cardigan most probably imagined, when he carried those pistols to the field with him, that one of them would be directed against his own person. Nor do I suppose, my Lords, that there was in the mind of Lord Cardigan any grudge against Captain Tuckett,—any personal animosity,—any rancour or malignity. Whether his Lordship gave or received the invitation, I am willing to believe that his only object was to preserve his reputation, and to

maintain his station in society as an officer and a gentleman. His Lordship is in the army, he is Lieutenant Colonel of the 11th Hussars ; and I have no doubt that he, upon this occasion, only complied with what he considered necessary according to the usages of society. Under these circumstances, if death had ensued, in the opinion of mankind it would have been regarded rather as a great calamity than as a great crime. But although moralists of high name have excused or even defended the practice of duelling, your Lordships must consider what it is by the law of England. My Lords, by the law of England there can be no doubt that parties who meet deliberately to fight a duel, if death ensues, are guilty of the crime of murder. It will be my duty, my Lords, to state to your Lordships a few of the leading authorities upon that subject. I will cite to you the opinions of—Hale, Hawkins, Foster, and Blackstone, the greatest names in our law.

My Lords, in Hale's Pleas of the Crown, the first volume, page 453, it is thus laid down, " If A. and B. fall suddenly out, and  
" they presently agree to fight in the field, and run and fetch their  
" weapons, and go into the field and fight, and A. kills B. this is  
" not murder, but homicide ; for it is but a continuance of a sudden  
" falling out, and the blood was never cooled ; but if there were de-  
" liberation, as that they meet the next day,—nay, though it were  
" the same day, if there were such a competent distance of time  
" that in common presumption they had time of deliberation, then  
" it is murder."

In the first volume of Hawkins's Pleas of the Crown, chapter 31, section 21, I find this passage, " It seems agreed that wherever  
" two persons in cool blood meet and fight on a precedent quarrel,  
" and one of them is killed, the other is guilty of murder, and  
" cannot help himself by alleging that he was first struck by the  
" deceased, or that he had often declined to meet him, and was  
" prevailed upon to do it by his importunity, or that it was his  
" only intent to vindicate his reputation, or that he meant not to  
" kill, but only to disarm his adversary ; for since he deliberately  
" engaged in an act highly unlawful, in defiance of the laws, he

“ must at his peril, abide the consequences thereof. And from  
“ hence it clearly follows that if two persons quarrel over night  
“ and appoint to fight the next day, or quarrel in the morning and  
“ agree to fight in the afternoon, or such a considerable time after,  
“ by which, in common intendment, it must be presumed that the  
“ blood was cooled, and then they meet and fight, and one kill the  
“ other, he is guilty of murder. And wherever it appears, from  
“ the whole circumstances of the case, that he who kills another on  
“ a sudden quarrel was master of his temper at the time, he is  
“ guilty of murder ; as if after the quarrel he fall into other dis-  
“ course, and talk calmly thereon ; or perhaps if he have so much  
“ consideration as to say, that the place wherein the quarrel  
“ happens is not convenient for fighting ; or that if he should  
“ fight at present, he should have the disadvantage by reason of  
“ the height of his shoes.” That, your Lordships may know,  
refers to Lord Morley’s case, where though your Lordships held it  
was a case of manslaughter, that circumstance was strongly pressed  
to show that it was an offence of a deeper dye.

Then, my Lords, Sir Michael Foster, in his discourse upon  
homicide, chapter 5, section 5, says, “ Upon this principle, de-  
“ liberate duelling, if death ensueth, is, in the eye of the law,  
“ murder, for duels are generally founded in deep revenge ; and  
“ though a person should be drawn into a duel, not upon a motive  
“ so criminal, but merely upon the punctilio of what the swords-  
“ men falsely call honour, that will not excuse ; for he that de-  
“ liberately seeketh the blood of another upon a private quarrel  
“ acteth in defiance of all laws, human and divine, whatever his  
“ motive may be. But if, as I said before, upon a sudden quarrel,  
“ the parties fight upon the spot, or if they presently fetch their  
“ weapons, and go into the field and fight, and one of them falleth,  
“ it would be but man-slaughter, because it may be presumed the  
“ blood never cooled. It will be otherwise if they appoint to fight  
“ the next day, or even upon the same day, at such an interval  
“ as that the passion might have subsided, or, if, from any circum-  
“ stances attending the case, it may be reasonably concluded that

“their judgment had actually controlled the first transports of  
“passion before they engaged. The same rule will hold, if after a  
“quarrel, they fall into other discourse or diversions, and continue  
“so engaged a reasonable time for cooling.”

Finally, my Lord, Blackstone, in the fourth volume of his Commentaries, at p. 199, thus writes, when describing and defining the crime of murder :—“This takes in the case of deliberate duelling,  
“where both parties meet avowedly with an intent to murder.” My Lords, he is not here qualifying a case in which he considers it to be murder, but he states that in all cases where parties do so meet it is murder. “This takes in the case of deliberate duelling,  
“where both parties meet avowedly with an intent to murder,  
“thinking it their duty as gentlemen, and claiming it as their right,  
“to wanton with their own lives and those of their fellow creatures,  
“without any warrant or authority from any power either divine  
“or human, but in direct contradiction to the laws both of  
“God and man, and therefore the law has justly fixed the crime  
“and punishment of murder on them, and on their seconds  
“also.”

My Lords, these are the highest authorities known to the law of England, and these authorities are uniformly followed by the judges of the land. One of the most recent cases is *Mirfin's*, which occurred within a few years at the Central Criminal Court, and in which the same doctrine was laid down and acted upon. There is the still more recent case of *Sir John Jeffcott*, which was tried before Mr. Justice Patteson, a most learned Judge, upon the western circuit, and upon that occasion his Lordship laid down the same law in the most precise and emphatic terms.

Such being the definition of murder to be found in all our books of authority, and such being the definition of it constantly given from the bench upon the trial of those who have stood upon their deliverance for life or for death,—are not your Lordships to suppose that the legislature makes use of the term “murder” in the same sense; and that when we find in Lord Ellenborough's Act, in the 9th George IV., and in this Act of the

1st of Victoria, the expression "with intent to murder," it means with intent to do that which, if accomplished, amounts, in point of law, to the crime of murder? The legislature when they passed this act, must be taken (your Lordships gave your sanction to this act) to have well known what was the legal definition of murder, and to have used that expression in its legal sense. Then my Lords, however painful the consideration may be, does it not necessarily follow that the first count of this indictment is completely proved? The circumstances, my Lords, clearly show that the Earl of Cardigan and Captain Tuckett met by appointment. Lord Cardigan, the ground being measured out, twice fires loaded pistols; he takes deliberate aim; he wounds his antagonist. He must be supposed to have intended that which he did. If unfortunately death had ensued, would not his have been a case of murder? My Lords, the only supposition by which the case could be reduced to one of manslaughter would be, that Lord Cardigan and Captain Tuckett casually met on Wimbledon Common; that they suddenly quarrelled; and that while their blood was hot they fought. But your Lordships can hardly strain the facts so far as to suppose that this was a casual meeting, when you find that each was supplied with his second, that each had a brace of pistols, and that the whole affair was conducted according to the forms and solemnities observed when a deliberate duel is fought.

Then, my Lords, with regard to the second and third counts of the indictment, I know not what defence can possibly be suggested; because, even if, contrary to all probability and all the circumstances of the case, there had been this casual meeting,—if it would only, had death ensued, have amounted to the crime of manslaughter, that would be no defence to the second and third counts of the indictment. My Lords, I presume to say so upon the authority of a case which came before the fifteen judges of England, and which was decided by them; two most learned judges doubting upon the occasion,—not dissenting. The two judges were his Grace the Lord High Steward and Mr. Justice Littledale. It would not become me to say any thing of the opinion I entertain of



the learning of his Grace, before your Lordships, but of Mr. Justice Littledale I may say there never was a more learned or acute judge. The bar of England have lately taken leave of him with the greatest reluctance and regret. I therefore would ascribe the greatest weight to any doubts even in such a quarter; but, my Lords, the other thirteen judges entertained no doubt; and they came to the conclusion, that upon the fourth section of this Act of Parliament it is not necessary for a conviction, that if death had ensued the crime should amount to murder. The case to which I refer, my Lords, is to be found in the second volume of Moody's Crown Cases, page 40. The case was tried before Mr. Baron Parke, upon the Norfolk Spring Circuit, in the year 1838.

*Lord High Steward.*—What is the name?

*Mr. Attorney-general.*—The Report, my Lord, is headed “Anonymous.” The name of the prisoner is not given, but the report seems very authentic. I believe it is in the words of the statement submitted by the learned judges for the opinion of their

brethren; and it will be found, I apprehend, ex-

Moody's Cr. Cases  
Reserved, vol. 2.  
p. 40.

pressly in point. “The opinion of the judges

“was requested by Mr. Baron Parke and Mr.

“Baron Bolland, upon two questions which arose

“on the Norfolk Spring Circuit, 1838.” It is only the first which

is material here. “Is it now a defence to an indictment for

“wounding with intent to maim, &c., that if death had ensued the

“offence would not have been murder, but manslaughter?” Your

Lordships will observe, that shooting at with intent to maim or

disable, and stabbing with intent to maim or disable, are in the

same category, are subject to the same punishment, and must be

attended with all the same rules and incidents. This, therefore,

my Lords, would have the same authority as if the case submitted

to the judges had been, whether, on an indictment for shooting at

with intent to disable, it would be a defence to show, that if death

had ensued, the crime would not have amounted to murder. The

arguments are not given, but this is the decision of the Judges:—

“At a meeting of the Judges, in Easter Term, 1838, they all

“ thought it to be now no defence to such an indictment, that if death had ensued the offence would not have been murder, but manslaughter, except Lord Denman, Chief Justice, and Littledale, Justice, who doubted.” They did not dissent, they only doubted; the other thirteen judges seem clearly to have held, that this would not now amount to any defence, and I humbly apprehend, that they probably reasoned in this manner,—that the intention of the legislature being to mitigate the penal code and to make offences which before were capital, punishable only with transportation or imprisonment,—if there were a shooting or stabbing with intent to maim or disable upon a casual scuffle, in heat of blood, without premeditation,—still it is meant to be an offence within this section of the Act of Parliament, which gives a discretionary power to the court before whom the offender is tried, either to transport for fifteen years or to imprison for a single hour. Therefore those learned judges, seeing the discretion that was given with regard to punishment,—seeing the omission of the proviso,—and seeing that it was no longer a capital offence,—came to the decision, that the offence was committed, though, if death had ensued, the crime would not have amounted to murder. Now, my Lords, looking to the authority of that case, I know not what defence can possibly be attempted with regard to the counts of the indictment charging the intent to maim and disable and do grievous bodily harm. The noble Earl must be supposed to have intended that which upon a second attempt he actually accomplished.

My Lords, I rejoice to consider that the noble prisoner will have an advantage denied to every individual who has hitherto been tried at your Lordships’ bar for felony;—an advantage which was not enjoyed by Lord Lovat, or Lord Byron, or Lord Ferrers, or the Duchess of Kingston; he will have the advantage of my most able and ingenious and Honourable Friend, Sir William Follett, addressing your Lordships in his behalf upon the facts and merits of the case. This arises, my Lords, from that most admirable law which your Lordships passed a few years ago, by which in all cases of felony the party accused has the benefit

of an address by counsel to the tribunal who are to determine upon his guilt or his innocence. But, my Lords, notwithstanding the learning, the ability, and the zeal of my Honourable and Learned Friend, Sir William Follett, I know not how he can persuade your Lordships to acquit upon any one count of the indictment. He will not ask your Lordships, and he would ask you in vain, to forget the law by which you are bound. My Lords, Captain Douglas stands upon his trial before an inferior tribunal; that trial has been postponed by the judges upon the express ground that this case should first be tried by the highest criminal court known in the empire. You, my Lords, are to lay down the law by which all inferior courts are to be governed.

My Lords, I would beg leave upon this subject to read the words made use of at this bar by one of the most distinguished of my predecessors, who afterwards, for many years, presided with great dignity upon the woolsack in your Lordships' house; I mean Lord Thurlow. When Attorney General, addressing your Lordships in the case of the Duchess of Kingston, he makes use of these expressions:—"I do desire to press this upon your Lordships as an universal maxim: no more dangerous idea can creep into the mind of a judge than the imagination that he is wiser than the law. I confine this to no judge, whatever be his denomination, but extend it to all; and speaking at the bar of an English court of justice, I make sure of your Lordships' approbation when I comprise even your Lordships, sitting in Westminster Hall. It is a grievous example to other Judges. If your Lordships assume this sitting in judgment, why not the King's Bench? Why not the commissioners of oyer and terminer? If they do so, why not the Quarter Sessions? Ingenious men may strain the law very far; but to pervert it, to new model it—the genius of our constitution says judges have no such authority, nor shall presume to exercise it."

My Lords, I conclude with respectfully expressing my conviction that, at the conclusion of this trial, your Lordships' judgment, whatever it may be, will be according to the law and justice of the case, and that your Lordships will preserve that high reputation in the

exercise of your judicial functions which has been so long enjoyed by your Lordships and your ancestors.

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**NOTE.**—The facts were proved substantially as above stated; but an acquittal took place on the ground that there was not sufficient proof of the Christian name of Captain Tuckett. The counsel for the Crown at the consultations before the trial, had distinctly pointed out the necessity for evidence to prove that Captain Tuckett's name was Harvey Garnett Phipps Tuckett, as stated in the indictment, and in the brief delivered to them by the very intelligent and honourable Solicitor, who acted on the occasion for the Home Office, there was abundant evidence to that effect. The deficiency arose from the witnesses when examined at the bar not giving the evidence which was expected from them.

Blame was very lavishly cast upon me for the result—some not scrupling to say that there had been a premeditated scheme to insure an acquittal.

This absurd charge did not give me one moment's uneasiness—but I was, I confess, much hurt by an accusation from very respectable quarters, that my address contained a defence of duelling, and had a tendency to encourage that practice. Nothing could be further from my intention, and I do not think that the language I employed can fairly receive such a construction.

Instead of referring to other occurrences from which the noble Earl had at the time incurred great unpopularity, I considered it my duty to confine the attention of his Judges to the charge which he had to answer before them. I continue to think that to engage in a duel which cannot be declined without infamy, and which is not occasioned by any offence given by the party whose conduct is under discussion,—whether he accepted or sent the challenge,—although contrary to the law of the land, is an act free from moral turpitude;—and to induce a just and enlightened tribunal to enforce the law of the land, there can be no propriety in trying to load the accused with unjust obloquy.

There is a great difference between a general approbation of duelling, and admitting that an officer in the army may be under the necessity of fighting a duel to preserve his station in society, and to prevent dishonour from being brought upon himself and his family. I consider, that to fight a duel must always be a great calamity, but is not always necessarily a great crime.

No one can more sincerely rejoice than I do, that from increased sobriety of habits and refinement of manners the practice of duelling has become so rare, and that from a change of feeling in the public mind, instead of there being any necessity for a young man entering life to shew his courage by a duel, he is worse looked upon if he has been involved in any such affair, and he has a subject of explanation, instead of boast, for the rest of his days.

Even in Ireland a duel confers no eclat ; and a recommendation of duelling from a Judge sitting on his tribunal would now excite as much astonishment in the Four Courts as in Westminster Hall.

We may hope that from the progress of this feeling the practice may almost become extinct, and that we shall not in future witness that conflict between law and manners which arises on a trial for duelling.

# HIGH TREASON.

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**SPEECH for the CROWN on the prosecution of JOHN FROST for HIGH TREASON, before the Special Commission at Monmouth, in January, 1840.**

## INTRODUCTION.

THIS case arose out of the most formidable insurrection which has taken place in this country since the times of Tyler and Cade. Above ten thousand men were assembled, generally well armed and disciplined. For some months before, they had been secretly trained for the enterprize on the mountains, and in the mines of Monmouthshire. Their plan was to take military possession of the town of Newport, and there to raise the standard of revolt, in the expectation of similar risings in other parts of the country. "The People's Charter" was then to have been proclaimed, and a provisional government established.

Absurd and hopeless as the plan was, it is appalling to think what mischief might have arisen before the insurrection was suppressed. But for a dark and tempestuous night, by which the different bodies were prevented from meeting at the appointed time, there can be no doubt that the efforts of the magistrates and the military

to guard the town of Newport must have been overpowered, and rebellion would have had a temporary triumph. The notion of carrying the charter by physical force was then very prevalent, and there is great reason to apprehend that other demonstrations of the same character would have been attempted.

I shall always rejoice in the recollection that order was restored, and the supremacy of the law vindicated, not only without the horrors of civil war, but without any infringement of the constitution. Under such circumstances, in other times, the *Habeas Corpus* Act would have been suspended, and new penal acts would have passed encroaching on public liberty. A different course was pursued, and a proof was given, which will be most salutary, that the delusions by which the multitude may be seduced from the duties of subordination and allegiance will be best corrected by the vigorous administration of justice according to our ancient constitutional laws. The only means resorted to by the Government to restore order was to appeal to Juries ;—and so faithfully did *they* discharge their duty that there was not a single instance of acquittal upon any Government prosecution against Chartists. The doctrine of *physical force* met with no countenance from the farmers and tradesmen constituting petty Juries any more than from the country gentlemen and merchants of whom Grand Juries are generally composed. Convictions so obtained operated more powerfully than any extraordinary stretch of authority could have done under new and arbitrary enactments. The consequence was, that all attempts to bring about change by violence have been abandoned, and for the last two years there has been the most profound tranquillity throughout the kingdom. The Chartists renouncing physical force and professing a respect for property, are now contented, according to their rights as Englishmen and their duty as good citizens, to propagate and support their doctrines by legal and constitutional means.

## SIR JOHN CAMPBELL, ATTORNEY-GENERAL.

MAY IT PLEASE YOUR LORDSHIPS,

GENTLEMEN OF THE JURY,—In the discharge of my official duty, I have the honour to attend you to conduct this important prosecution; and I hope you will believe that my only object is, that the facts of the case may be fairly laid before you;—that truth may be fully investigated;—that innocence may be vindicated, if innocence exists; and that you should only pronounce a verdict of guilty upon clear and convincing evidence. Gentlemen, it is highly important that parties accused should be zealously and ably defended; but it is also of importance that the law should be vindicated;—that the peace of society should be preserved,—and that, where crimes have been committed, the criminals should be brought to punishment.

Gentlemen, I think that no one will deny the necessity of the solemn inquiry in which we are engaged. There has recently been in this county an armed insurrection;—the law has been set at defiance;—there has been an attempt to take forcible possession of the town of Newport;—there has been a conflict between the insurgents and the Queen's troops;—there has been bloodshed;—many lives have been lost. The intelligence of these tragical events has caused alarm and dismay throughout the kingdom.

Various persons charged with having been concerned in the outrages were committed on a charge of the highest crime known to the law. Not only on account of the importance of the occasion, but from the forms of law that are required where such a charge is brought forward, it became necessary that her Majesty should issue a special commission into this county for the trial of the accused. Gentlemen, a bill of indictment for high treason has been found, by the Grand Jury of this county against certain persons, and, amongst others, against John Frost, the prisoner at the bar. But, gentle-



men, he is still to be presumed to be innocent ; all that the indictment says is, that it is fit that he should be put upon his trial ; and unless there is strong, clear, and convincing evidence to prove the guilt imputed to him, it will be your duty to say that he is not guilty.

I need hardly caution you to dismiss from your recollection all that you may have read or heard upon this subject. You are to be guided entirely by the evidence, and you will proceed as if you had never heard of the case until the indictment was read over to you by the officer of the Court. Gentlemen, I would further use the liberty to say, that you are not to act upon my statement, either as to the law or the facts. The law you will receive from the venerable Judges who preside here ; the facts you will hear from the witnesses ; and you will be guided entirely by the evidence they give, and by the credit to which you think their testimony may be entitled.

Gentlemen a most important charge has been given to you, to decide upon the guilt or innocence of the prisoner. No men can have higher functions to discharge : the life and the reputation of the accused are in your hands. You will likewise allow me to remind you that there are in your hands the public safety and the public justice of the country.

This indictment against John Frost consists of four counts. There are two for levying war against her Majesty in her realm ; the third is for compassing to depose the Queen from her royal state and dignity ; and the fourth is for compassing to levy war against the Queen with intent to compel her to change her measures. I believe, according to the instructions I have received, that there will be evidence which will bring home the charge against the prisoner at the bar upon each of these four counts ; but it is probable that your attention may be chiefly directed to the counts of the indictment, for levying war against the Queen in her realm.

These two counts are framed upon an ancient Act of Parliament passed in the 25th year of the reign of Edward III., a statute which has been considered the safeguard of the liberties of Eng-

land ; another Magna Charta ; a statute which, if properly enforced, is likewise to be considered a safeguard of the public peace and tranquillity. It is a statute, gentlemen, that is neither to be strained, nor is it to be evaded and frittered away. There had been in the reign of Edward III., complaints that the law of treason was vague and unknown ; and to rescue the country from that miserable servitude, this statute was passed. It is intituled, "A declaration which offences shall be adjudged treason," and it thus begins : "Item, Whereas divers opinions have been before this time in what case treason shall be laid and in what not ; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth, that is to say"—now these things that follow are declared to be treason ; "when a man doth compass or imagine the death of our Lord the King, or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably attainted of open deed by the people of their condition." It is, therefore, hereby declared to be a substantive treason to levy war against the King in his realm. That is to be proved by acts that are done, and it must be proved clearly and satisfactorily.

But then, gentlemen, it is not every breach of the public peace, even with an armed force, that amounts to the crime of treason. It must be for some public object, and upon some premeditated plan ; and this is guarded by the statute itself, for it goes on with a proviso or enactment in these words : "And if per case any man of this realm ride armed covertly or secretly with men of arms against any other to slay him or rob him, or take him or retain him till he hath made fine or ransom for to have his deliverance, it is not the mind of the King nor his council that in such case it shall be judged treason ; but shall be judged felony or trespass according to the laws of the land of old time used, and according as the case requireth." Therefore, gentlemen, you have the line clearly drawn by the legislature ; for it is not to be held treason to ride armed, to slay a person, or to rob him, or to take him, or to

retain him till he hath made fine or ransom. Wherever there is private revenge only to be gratified, or a private grievance to be redressed, or a private object to be attained, although force may be used, and although this may be an offence against the law, it does not amount to the crime of treason. But where you have an armed force setting the law at defiance for a general object, that is an offence comprehended by this Act of Parliament. Levying war against the King does not mean merely a warlike expedition by a pretender to the Crown,—according to the instances that we have in the wars of York and Lancaster,—or as in the rebellions in the year 1715 or 1745,—but wherever there is an armed force seeking to supersede the law and to gain some public object.

This exposition of the law is not to rest upon my authority. I will state to you upon this subject the opinion of one of the most eminent, most learned, and most constitutional judges that ever adorned the English bench—I mean Sir Michael Foster. Gentlemen, he has defined the offences which this statute comprehends, and after pointing out that it is not to apply to private cases, he goes on thus : (I will read the whole of the passage, that it may be fairly before you), “The case of the Earls of Gloucester and Hereford, and many other cases cited by Hale, some before the Statute of Treasons, and others after it,—those assemblies, though attended, many of them, with bloodshed, and with the ordinary apparatus of war, were not holden to be treasonable assemblies. For they were not, in construction of law, raised against the King, or his Royal Majesty, but for purposes of a private personal nature. Upon the same principle and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular enclosures, or to remove nuisances, which affected, or were thought to affect, in point of interest, the parties assembled for these purposes, or to break prisons in order to release particular persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute. And upon the same principle and within the same equity of the statute, I think it was very rightly holden by five of the Judges, that a

rising of the weavers in and about London to destroy all engine-looms—machines which enabled those of the trade who made use of them to undersell those who had them not—did not amount to levying war within the statute ; though great outrages were committed on that occasion, not only in London but in the adjacent counties, and the magistrates and peace officers were resisted and affronted. For those Judges considered the whole affair merely as a private quarrel between men of the same trade, about the use of a particular engine, which those concerned in the rising thought detrimental to them. Five of the Judges indeed were of a different opinion. But the Attorney-general thought proper to proceed against the defendants as for a riot only.” (These are the various instances in which, he says, the statute does not apply :) “ But every insurrection which in judgment of law is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of Government, or to remove evil counsellors round about him,—these risings all amount to levying war within the statute ; whether attended with the pomp and circumstances of open war or not. And every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King’s death. For these purposes cannot be effected by numbers and open force without manifest danger to his person.” Then follows, gentlemen, this passage, which will require your particular attention : “ Insurrections in order to throw down all inclosures, to alter the established law, or change religion, to enhance the price of all labour, or to open all prisons,—all risings in order to effect these innovations of public and general concern by an armed force, are, in construction of law, High Treason, within the clause of levying war. For though they are not levelled at the person of the King, they are against his Royal Majesty ; and, besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all Government too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, or for the expulsion of foreigners in

general, or indeed of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest,—risings to effect these ends by force and numbers, are by construction of law, within the clause of levying war. For they are levelled at the King's Crown and Royal dignity."

I hope, Gentlemen, it will not be said, in this case, that we are resorting to constructive treasons or interpretative treasons; we seek to bring our case within the specific offence defined by the Act of Parliament, as that Act of Parliament has ever been understood, from the time that it passed in the reign of Edward III. If armed insurrections were not considered as treason, and to be punished with the greatest severity of the law, what safety could there be for society? There are many temptations of ambition, of revenge, of wrong-headed zeal, which may lead individuals to attempt to bring about a revolution in the Government, and to change the existing state of affairs. If such attempts could be made at the mere peril of the punishment inflicted on misdemeanors, there is great reason to fear, that they would not be rare, although they lead to confusion, bloodshed, and a general dissolution of society.

There is another passage in Sir Michael Foster's Law of Treason which follows soon after, and which may be very material for your consideration in this case; at section 10 of the same chapter, he says, "Attacking the King's forces in opposition to his authority upon a march, or in quarters, is levying war against the King; but if upon a sudden quarrel, from some affront given or taken, the neighbourhood should rise and drive the forces out of their quarters, that would be a great misdemeanor, and if death should ensue, it may be felony in the assailants, but it will not be treason, because there was no intention against the King's person or Government." You have it here laid down, that attacking the King's forces, in opposition to his authority upon a march, or in quarters, is levying war against the King. If it should be upon some sudden affray, upon provocation given, or without premeditation, it may be only a

great riot ; but where it is an attack upon the King's troops, by premeditation and design, that is a substantive offence within the Act of Parliament.

I shall very briefly allude to the law as it is connected with the other two counts of the indictment. They are framed upon an Act of Parliament that was passed in the 36th year of the reign of his late Majesty King George III., with the view of expounding and defining more accurately in some respects the Act of Edward III. The 7th chapter of the 36th of George III. enacts, "That if any person or persons shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the same our Sovereign Lord the King, his heirs and successors, or to deprive and depose him or them from the style, honour, or kingly name of the imperial Crown of this realm, or of any other of his Majesty's dominions or countries ; or to levy war against his Majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate, or overawe, both Houses, or either House of Parliament ; or to move or stir any foreigner or stranger with force to invade this realm, or any other his Majesty's dominions or countries, under the obeisance of his Majesty, his heirs and successors ; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed ; being legally convicted thereof, upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons, so as aforesaid offending, shall be deemed, declared, and adjudged to be a traitor."

The third count of this indictment charges the prisoner with having compassed to dethrone the Queen from her royal state and dignity ; and if it shall appear in evidence before you that there was an armed insurrection, that the object of that was of a public na-

ture, that it was to supersede the authority of the Crown, then I humbly apprehend that this count of the indictment would likewise be supported.

The last count of the indictment charges the prisoner with having compassed to levy war with a view to compel her Majesty to change her measures. Again, Gentlemen, that is to be proved by overt acts ; but if it shall appear, as I have just stated to you, that there was this plan, and that this plan was prosecuted until it was actually subdued by superior force, then, Gentlemen, that was a clear levying of war against the Queen within her realm, and there can be no doubt that there was a compassing to levy war within the meaning of the Act of Parliament.

Before I conclude these observations upon the law of the subject, which of course I make with humble deference, under the direction that you will receive from my Lords the Judges, I will refer you to the latest authority which is to be found, and there can be none higher, upon this subject. Gentlemen, what I am now going to read is part of the charge of that great Judge, Lord Tenterden, in expounding the law in the case of Arthur Thistlewood, where he takes a view, both of the old statute of Edward III., and of the modern statute of the 36th of George III. In charging the Grand Jury at the opening of the commission as to the evidence that was to be received, and how the charge was to be established, he uses these words : “ Before the passing of the late statute it had been settled, by several cases actually adjudged, and by the opinions of the text writers on this branch of the law, that all attempts to depose the King from his royal state and title, to restrain his person, or to levy war against him, and all conspiracies, consultations and agreements for the accomplishment of these objects, were overt acts of compassing and imagining the death of the King. By this statute, the compassing or intending to commit these acts—that is, to depose his Majesty, to restrain his person, or to levy war against him for the purposes that I have mentioned—is made a substantive treason ; and thereby the law is rendered more clear and plain, both to those who are bound to obey it, and to those who are engaged in

the administration of it. It may be proper for me to add, that it has been established, in the like manner, that the pomp and circumstances of military array, such as usually attend regular warfare, are by no means necessary to constitute an actual levying of war, within the true meaning of the ancient statute. Insurrections and risings for the purpose of effecting, by force and numbers—however ill-arranged, provided or organized—any innovation of a public nature, or redress of supposed public grievances, in which the parties had no special or particular interest or concern, have been deemed instances of the actual levying of war; and, consequently, to compass or imagine such an insurrection, in order, by force and numbers, to compel his Majesty to alter his measures or counsels, will be to compass or imagine the levying of war against his Majesty for that purpose, within the just meaning of the modern statute. Rebellion, at its first commencement, is rarely found in military discipline or array, although a little success may soon enable it to assume them. <sup>(a)</sup>

Gentlemen, I really am not aware that any difficult or doubtful point of law respecting the interpretation of either statute can possibly arise in this case. I will therefore proceed to give you a short outline of the facts which, as I understand, will be clearly proved before you in evidence. For that purpose, I must remind you of the geographical situation of the county in which the disturbances took place. You are probably well acquainted with what is called the Hill district in the county of Monmouth; this is of a triangular form, the triangle having for its apex Risca, a place about five miles from Newport; the base is at the distance of from fifteen to twenty miles as you ascend the country; on the west side you have Nantyglo and the Beaufort iron works; on the east side you have Blaenavon and the hills in that neighbourhood, Blorenges being the highest. That country is intersected by deep glens, watered by mountain streams. Of these the most considerable are the Romney, on the west, and the Sirhowy, which flows nearly

(a) St. Tr. vol. 33, p. 684.



parallel to it. Then comes the Ebbw. High up the country there are the Ebbw Fauch and the Ebbw Vaur; they join and flow down towards Newport. Near Pontypool there is the Afon, which rises at the foot of the Varteg mountain.

In that country, as you are aware, Gentlemen, there are rich mines of coal and iron. These of late years have been worked to a very great extent; and those mountains and valleys, which half a century ago were almost uninhabited, having only a few shepherds' huts scattered up and down, are now the seat of a dense population, estimated, I think, at above 40,000, who are employed in working the mines and in supplying the wants of the workmen. I am afraid that this population, which has suddenly sprung up, is, in many instances, not of the most peaceable description. I am afraid, Gentlemen, that ignorance prevails there to an extent very much to be deplored; and that many of the persons who live in this district are subject to be practised upon by designing men. It would appear that this population has been organized by the establishment of affiliated societies, so that upon any occasion a summons to assemble might be circulated and speedily obeyed,—like the gathering of a highland clan by the fiery cross.

Gentlemen, it will appear that the prisoner, John Frost, who had been for many years a linen-draper in the town of Newport, had very extensive influence in this part of the country—I mean in the Hill district, in Monmouthshire. Newport, you are well aware, is the place to which the coal and the iron obtained in those mines is sent for exportation, and from which the supply of all that is wanted by the miners is obtained. It is the highway from South Wales to Bristol, to Gloucester, to Birmingham, and to the north of England. The possession of it by an insurgent force might well be considered the successful commencement of rebellion.

Gentlemen, it will appear before you, that in the week before Sunday, the 3rd of November, a plan was laid for a general rising of the population of this district, to take place on the night of that Sunday. There were various consultations at which Mr. Frost was present. These were held chiefly at a place called Blackwood,

which is between the Rumney and the Sirhowy. There is a public-house there, called the Coach and Horses, where there was a lodge or society of Chartists, and at which meetings were held, and where it is quite clear that this design was laid. There was particularly a meeting there on Friday the 1st of November. At that meeting deputies attended; there was a return of the armed force that could be mustered; and it will appear that the plan of an armed insurrection was matured. Orders were issued that the men should assemble armed on the evening of Sunday, the 3rd of November. There were to be three principal divisions: one was to be under John Frost himself, at that time stationed at Blackwood; another was to be under Zephaniah Williams, who lived higher up the country; he kept a beer-shop, at a place called Coalbrook Vale, which is on the river Ebbw, near Nantyglo; he was to collect the men on the hills up the country, and to bring them down towards Newport. The third division was to be under the control of a person of the name of William Jones, a watch-maker, at Pontypool. He was to collect the men more to the north and the east, and to bring them down to the low country. These three divisions were all to meet somewhere about Risca or the Kefn, about five miles from Newport. The plan was, that they should be at that place by about midnight, and being assembled there, they were to march on to Newport, which they were to reach at about two in the morning,—at a time when it was expected that there could be no preparation to receive them, when the inhabitants were buried in sleep,—entirely disarmed,—and even without the suspicion of danger. Arriving at Newport, they were to attack the troops that were there; they were to get possession of the town; to break down the bridge which is there erected across the river Usk, Newport, as you are aware, being at the mouth of that river; they were to stop the mail; this was to be a signal by which the success of the scheme was to be announced; the mail from Newport not arriving at Birmingham, it would be known by those who were in concert with them in that town that the scheme had succeeded. There was then to be a general rising in Lancashire and throughout the

kingdom, and Charter law was to be universally and instantly established.

There never was the remotest chance of this scheme being accomplished ; but, gentlemen, if it had not been that, providentially, the night between the Sunday and the Monday was one of the darkest and most tempestuous known for many years, it is difficult to conjecture the degree of mischief that might have been effected, before the insurrection could have been suppressed, and peace and tranquillity restored.

John Frost, the prisoner, remaining at Blackwood, the men that were to be under his command did assemble, and march, considerably earlier than the other divisions. He crossed over from Blackwood to Newbridge, which is in the Ebbw Vale ; he came down by Abercarn to Risca and the Welch Oak ; and there he was early in the night ; but from the difficulties to be encountered by the other two divisions, which were to come from the other parts of the country, they did not arrive till long after the expected hour. Zephaniah Williams, who was to bring the men from Nantyglo, did not arrive, I believe, till after daylight. William Jones, who was to bring the men from the neighbourhood of Pontypool, was still later. John Frost, the prisoner, having come down to the neighbourhood of Risca and the Kefn, remained there till shortly before daylight, and then he thought it necessary to muster the forces that were then collected, and to march upon Newport. There were collected at that time, according to the best computation that can be made, about 5,000 men ; many of them were armed with guns and pistols, many with spears or pikes, many with an instrument called a mandril, which, as I understand, is made of iron, and used for picking coals in the mines,—resembling a pickaxe in shape,—a very dangerous and deadly weapon of offence. Others had scythes fixed upon poles, and those who could not get arms were provided with sticks and bludgeons. Mr. Frost took the command. They marched in military order, five abreast. The word of command was given from time to time by Mr. Frost. They came down from the Kefn by Pie Corner to Tredegar Park, which is the

seat of Sir Charles Morgan, and through which a high road and a tram-road pass. By the time they got to Tredegar Park day had dawned. They marched on by the Waterloo public-house till they came to Court-y-Bella, which is about half a mile from the town of Newport, and where there is a weighing machine by the road side. Inquiries were then made by Frost with respect to the state of affairs in Newport.

I will now mention to you what had been going forward in that town during the night. It was on the Sunday that intelligence was brought to Newport of these movements in the hill country. Fortunately, gentlemen, the then mayor of Newport was Mr. Phillips, now Sir Thomas Phillips, who behaved upon this occasion in a constant, firm and intelligent manner, for which his country must ever be deeply indebted to him. Special constables had been sworn in, and were stationed at the most important points. There are three principal inns at Newport—the Westgate Inn, the King's Head, and the Parrot. These were considered the principal stations, and there the special constables were first stationed. The Westgate Inn is in the market-place, and was considered the most important station of all. Here the mayor took post with other magistrates, and he sat up during the whole night, sending out patrols for information, and making the best preparations that he could to preserve the peace and to defend the town. When day had dawned, intelligence was brought that the insurgents were advancing, and were in the neighbourhood of Newport. He had sent out a person, whom I will call before you as a witness, of the name of Walker, to gain information ; that person had been shot at, and returned dangerously wounded ; the object of those who assailed him being to intercept all communication between Newport and the upper country, from which the insurgents were descending.

The mayor then sent for military assistance. There were in the neighbourhood only one company of soldiers, under the command of Captain Stack ; they were stationed in the workhouse, which is upon the outskirts of the town and had been converted into a temporary barrack. Captain Stack sent thirty men to the assistance of the mayor, under the command of Lieutenant Gray and

two serjeants. I believe the barracks are about half a mile from the Westgate Inn. Lieutenant Gray brought his men to the Westgate Inn, and in a little time they were stationed in a room in that inn, which it will be material that I should describe to you. The inn is in Westgate-street, fronting the north. On the east side there is a room with a bow window looking towards the street; in that room the military were stationed. There is a corresponding room on the western side of the Inn, where the magistrates had been assembled. Between those two rooms there is a corridor or passage, which you will find was peculiarly the scene of bloodshed. The special constables remained before the door of the inn, where they had been placed. The military had not loaded their guns, and it will be a fact most material for your consideration in this case, that they did not even load their guns until they had been fired upon.

This being the state of things in Newport, as the insurgents were approaching Frost at the head of the body, and giving the word of command they reached the weighing machine at Court-y-Bella, and there Frost inquired respecting the military. He was told by two boys whom he met near the turnpike, that a number of soldiers had been sent towards the Westgate Inn. Upon that, gentlemen, the insurgents divided, part of them turned to the left and went up a hill to St. Woollos Church; part kept on to the right, and went down into the town of Newport, through Commercial-street; this last division afterwards came up and joined the others who had gone up by St. Woollos Church or The Friars. The column then proceeded down Stowe-hill, which leads to the Westgate-inn, where Frost had been told that the military were. He still walked at their head and passed a place called the Catholic chapel, which is at the back of the Westgate Inn. The insurgents tried to gain admission into the Inn by a carriage entrance, which leads into the Court-yard, but failed in doing so. They then wheeled round in Front of the Westgate Inn, Mr. Frost still leading them on. The constables I told you were before the door—the insurgents asked them to surrender. One of them said,

“No, never.” Upon which the word of command, “Fire!” was given ;—by whom you will hear from the witnesses. Immediately, gentlemen, the firing did begin upon the bow window of the room in which the military were stationed, and the insurgents attempted to break in at the front door, by the porch, into the interior of the House. They made use of their pikes for the purpose of forcing the door ; they succeeded ; they got into the hall ; they got into the passage leading from the magistrates’ room to the room where the military were stationed.

Gentlemen, it was now time for Lieutenant Gray to do what became him as an officer of her Majesty, and as a subject of this country, who wished to preserve the lives of his fellow-subjects, and to prevent universal confusion. He ordered the military to load ; they loaded. I have mentioned to you that this room in which they were stationed had a bow window, that is to say it had a projecting window, not circular, but with three sides. The window shutters were shut ; the glass had been broken by the shots that had been discharged ; but while the window shutters were shut the soldiers could not make use of their muskets and fire upon the insurgents in front. Lieutenant Gray, who upon this occasion acted certainly in a manner above all praise for the moderation, the firmness, the energy and the intelligence he displayed, went to open the shutters of one part of the window,—the Mayor of another,—and Serjeant Daly of the third. As the Mayor was opening the shutters he received two wounds—one about the shoulder, and another in the hip. Serjeant Daly was severely wounded in the head by slugs that were poured in, and a musket which he held in his hand had the lock knocked off by a ball from the insurgents. The soldiers were ordered to fire. Gentlemen, at this time the insurgents had gained admission into the House ; they were in the passage leading to the room in which the military were assembled, and if the order to fire had not been given, there seems no reason to doubt that in a few minutes the military must all have been massacred. The order was given ; it was speedily and effectually obeyed. The insurgents in the passage were fired

upon, and several fell. The shutters being removed, the men directed their pieces from the window; they then had a complete command of the space on which the insurgents had been drawn up. They fired into the street, and several were there wounded and fell. There was a speedy dispersion—they all fled in every direction.

Mr. Frost was not seen after the time when the firing first began. Zephaniah Williams was about ten minutes too late. He did arrive at last with the Nantyglo men—a band, nearly as numerous as those that were led on by Frost in person. William Jones, from Pontypool, did not get nearer than the neighbourhood of Malpas; he was proceeding down a lane to meet the other party, when he heard of the disaster that had taken place to his associates in Newport. He likewise fled, and his men dispersed. I should have mentioned to you, Gentlemen, that all these three parties, as they came down, scoured the country, and pressed into their service various persons who were unwilling to attend them, but who were compelled by them to march, and at the same time they seized all the arms and ammunition they could discover. Frost himself was observed, after the action was over, retreating up Commercial-street; he was afterwards seen in Tredegar Park, about two miles from Newport, making his escape into a wood, and he was apprehended in the town of Newport on the Monday evening, at the house of a person of the name of Partridge, with loaded pistols and ammunition upon him.

Gentlemen, it will be for you to say, if these facts are proved, whether there can be any reasonable doubt in your minds of the guilt of the prisoner at the bar. How are these facts to be proved? With regard to the main circumstances of the case, no doubt can possibly be entertained. I shall prove the facts by witnesses above all exception, wholly unconnected with these disturbances, who were trying to establish peace and to restore tranquillity.

With regard to particular declarations made by Mr. Frost, which for the present I avoid detailing to you, those most undoubtedly will much depend upon the evidence of persons who were more or less concerned with him in the insurrection. My learned Friend

will, no doubt, make comments upon their testimony, as he will be fully justified in doing,—and he will call them accomplices. Gentlemen, whether they were there voluntarily, or by compulsion, there can be no doubt that their evidence is to be received with suspicion; it is to be weighed with caution; but if you do sift their evidence, and if you do see no reason to question their veracity, then, Gentlemen, you will not hesitate to believe the evidence they give. Such evidence in such a case must be laid before a jury. It is quite clear that treasonable consultations never will be held in public. How then are they to be proved? It must be either by the employment of spies and informers, whose evidence has always been condemned, and very often disbelieved, or it must be by the evidence of those who were actually, to a certain degree, associated in the enterprise. In this case I propose to call before you no spy or informer, for none such were employed; but I do propose to call before you several who were concerned in this insurrection, and who, I submit to you, may be safely trusted if their evidence shall be consistent, and if they shall be corroborated in the main facts to which they speak. Upon that evidence, Gentlemen, if you shall believe it, little doubt can exist in your minds with regard to the guilt of the prisoner.

It gives me the most sincere satisfaction to find that he is defended by Gentlemen of the first eminence and the first talents at the bar of England. Every thing that zeal, every thing that learning, every thing that eloquence can accomplish, will be brought forward in his cause. I own, Gentlemen, that it seems to me that my Learned Friends, upon the proof of these facts, must have a very difficult task to perform. I think they will hardly deny the law of High Treason, as it is laid down by Mr. Justice Foster and by Lord Tenterden. Well, then, Gentlemen, according to the evidence that will be laid before you, there was an armed insurrection, very formidable in numbers, with a public purpose. There was actually a conflict with the Queen's troops—not accidental—not on any sudden affray—but with premeditation and design. Will my Learned Friends then say, that there was some private object which



the prisoner sought to obtain? What that could be I am wholly at a loss to conjecture. I hear nothing of any private revenge; I hear nothing of any private grievance; this was not a meeting for discussion; it was not a meeting for petitioning the Queen or either House of Parliament; it was not a meeting arising out of any dispute between masters and servants in the coal trade or in the iron trade; it was not any sudden outbreak from want of employment, or from want of food; for I believe it will turn out that the coal and iron trade have seldom been more prosperous, that employment was easily obtained, that wages were high, and that those who were engaged in this insurrection had no pretended private grievance to be redressed. Then, Gentlemen, what is the conclusion to be drawn?—That the witnesses whom I call before you speak the truth—that there was this public object—by armed force to change the law and constitution of the country.

Unless the offence is clearly brought home to the prisoner, gentlemen, it will be your duty to acquit him, and you will have pleasure in doing so. But if the case should be satisfactorily established, you will act a manly part,—you will not shrink from your duty, whatever may be the consequences. Gentlemen, it imports us all, in whatever situation of life we may be, that the law should be respected and obeyed. Whether landed proprietors, or farmers, or merchants, or tradesmen, or labourers,—whatever our position in society,—high or humble,—it equally imports us all that such efforts should be effectually suppressed; it equally imports us all, for the sake of example, that punishment should follow crime.

Gentlemen, I have given you a short outline of the facts that are to be laid before you. I have avoided the statement to you of particular expressions, which you will hear much better from the witnesses, whom I will now proceed to call before you.

An intimation has been given on the part of the counsel for the prisoner, that the proper forms of law have not been observed. If that should turn out to be the case, by all means let the prisoner have the benefit of the irregularity. But I believe it will be found, that the forms of law have been most strictly pursued, and that any

deviation from the usual course has proceeded from a desire that those who are accused should have the most ample opportunity for preparing their defence and vindicating their innocence. After the witnesses for the Crown shall have been called and examined, and you shall have listened with all attention to the arguments and observations that may be urged on the part of the prisoner, and to any evidence he may adduce, then your important duty must be performed,—to pronounce the prisoner guilty or not guilty ; and I am sure, that your verdict will be satisfactory to the public justice of the country.

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NOTE.—After a very able defence of the prisoner, by Sir Frederick Pollock and Mr. Kelly, he was found guilty, and the usual sentence in cases of High Treason, was passed upon him,—subject to a point reserved for the opinion of the Judges, as to the sufficiency of the service of a copy of the indictment, the Jury panel, and a list of the witnesses before the trial. A majority of the Judges were of opinion that the conviction was proper. The sentence was commuted to transportation for life.

# PROSECUTION FOR BLASPHEMY.

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**SPEECH** for the **CROWN** on the trial of **J. HETHERINGTON**,  
for Blasphemous Libel, in the Court of Queen's Bench,  
before **LORD DENMAN**, on the 8th of December, 1840.

## INTRODUCTION.

I PUBLISH the following opening Speech and Reply, as containing my deliberate sentiments on the delicate and difficult subject of prosecutions for blasphemy. Notwithstanding my attachment to free inquiry as conducive to the interests of truth, and the spread of rational piety, I entertain no doubt, that there are occasions when the civil magistrate not only may, but is bound to interfere to check the circulation of publications which assail the foundations of morality, or vilify the national religion. In each particular case the persons intrusted with the power to put the law in force, must determine whether, on balancing evils, it is expedient to prosecute or to forbear.

## SIR JOHN CAMPBELL, ATTORNEY-GENERAL.

MAY IT PLEASE YOUR LORDSHIPS,

GENTLEMEN OF THE JURY,—This is an indictment found by the Grand Jury, for the County of Middlesex, against the Defendant, for having published certain blasphemous libels.

Till I am made acquainted with the line of defence which is to be attempted, I shall address you very briefly. If I prove, according to my instructions, that the Defendant is the publisher of the books which are the subject of this prosecution, I humbly apprehend that you cannot hesitate for a moment to find him guilty. You will not only be of opinion that he has committed an offence for which he is liable to be prosecuted; but that it was indispensably necessary to put the law in motion against him.

I do not hesitate to confess, that I have instituted the prosecution with the greatest reluctance; I am aware of the evils arising from such a discussion; but I am convinced that greater evils would have arisen from further forbearance.

The Defendant has ostentatiously and obstinately persisted in a course which leaves me no choice but to bring him before a Jury of his country, that they may decide upon his conduct.

I rejoice to think, that every man in England may worship God according to his conscience,—and with decency he may combat the religious opinions of others. The law fully recognises the right of all who take the holy scriptures for their guide, to impugn the peculiar doctrines of the Established Church. How far the attempt of an unfortunate and misguided man, by historical research and sincere reasoning, to question the truth of Christianity itself, could be defended in a court of justice, it is unnecessary now to determine; but I am sure it would be inexpedient and improper to

present such a man at the bar of a criminal court, and to pray against him sentence of fine and imprisonment. His book may be answered; his errors may be exposed; his sophisms may be refuted. He addresses the educated and the reflecting, who will best be protected from the contagion of his scepticism by the intellectual efforts of men more learned, acute, and logical. But it is quite clear, Gentlemen, that the law of England will not sanction, and I am humbly of opinion, that those who have to superintend the administration of the law ought not to tolerate an attack upon the Christian religion, characterised by mere invective, ribaldry and abuse, and addressed to the vulgar, the ignorant, and the unthinking.

Gentlemen, if I were constructing a new criminal code, I would make it punishable to publish a book containing such an attack upon any religion professed by any body of citizens in the state. But as the law now stands, there can be no doubt, that to assail with obloquy, and to insult the holy scriptures of the Old and New Testament, which we believe to contain the revealed will of God, is a crime for which punishment may and ought to be inflicted. There are two grounds on which it seems to me, that such an act may properly be made the subject of penal visitation. In the first place it wounds and shocks the feelings of those who are entitled to the protection of the law, not only for their persons and property, but for every thing belonging to them which contributes to their comfort and enjoyment. However, the great mischief of this act, arises from its tendency to dissolve the foundations of moral obligation, on which society rests. The vast bulk of the population in this country believe that morality depends entirely on revelation; and if a doubt could be raised among them, that the Ten Commandments were given by God from Mount Sinai, men would think they were at liberty to steal,—and women would consider themselves absolved from the restraints of chastity. A publication openly inciting to theft or licentiousness, would surely be a fit subject of prosecution, and so must be any other publication of a similar tendency. The civil magistrate is not to interfere with private opinion, or with phi-

losophical speculation ; but he is called upon to repress what directly leads to crime,—as much as to punish crime when actually committed. Now, gentlemen, can there be a doubt, that in a Christian country, the effect must be most pernicious of a publication, which, without investigation to be examined, or reasoning to be refuted, —broadly asserts that the Bible is a compound of filth, blasphemy, and nonsense, that its author was an idiot, and that it ought to be burned to prevent posterity from knowing that we believed in such abominable trash ?

Gentlemen, the defendant keeps a bookseller's shop in the Strand, with his name written over the door in large characters. There he has persisted in selling a work published in numbers, entitled "Letters to the Clergy of all denominations," at the price of one penny a number, purporting to be written by C. J. Haslam, and with Mr. Hetherington's name as publisher, in the title page. This work does not in any degree address itself to the understanding, but is filled with mere bantering, reviling, and coarse ridicule of the scriptures, particularly of the Old Testament. I am exceedingly concerned that your ears must be wounded by hearing such impious ravings, but it was necessary that some passages should be put upon the record, and these must be read by the officer of the Court in your hearing. I shall content myself with laying before you by way of specimen, an extract from the Eighth Number. "What  
"wretched stuff this Bible is to be sure! What a random idiot  
"its author must have been! I would advise the human race to  
"burn every bible they have got. Such a book is really a disgrace  
"to ourang-outangs, much less to men. I would advise them to  
"burn it in order that posterity may never know we believed in  
"such abominable trash. What must they think of our intellects?  
"What must they think of our incredible foolery? And we not  
"only believe, but we actually look upon the book as the sacred  
"word of God, as a production of infinite wisdom. Was insanity  
"ever more complete? I, for one, however, renounce the book. I  
"renounce it as a vile compound of filth, blasphemy, and nonsense;  
"as a fraud and a cheat; and as an insult to God."

Had this publication remained in obscurity, only a few copies of it being sold,—however much the publisher might be to be condemned, I should have preferred permitting him to escape with impunity, rather than drag it into notice ; but there is reason to apprehend that the efforts to bring it into circulation have been too successful, and if the strong arm of the law is not called in, the sale will go on with increased audacity, and it will be succeeded by other works equally flagitious and demoralizing.

What other course is to be pursued? This is poison to which no antidote can be administered, and you can only strive to prevent its further distribution. What could a Paley or a Watson do against C. J. Haslam, if there be such a man in existence? The author of such a work does not reason and cannot be reasoned with. He is to be punished, not refuted.

Will it be said by the defendant that this prosecution is an improper interference with private opinion, and an attempt to stifle inquiry? Gentlemen, it is utterly impossible for him to say, that he had any desire to assist in the investigation of truth, or that he had for his object the propagation of any opinion. He could only have been actuated by a sordid desire of profit from an extensive sale of a cheap publication, indifferent as to its contents, and reckless as to the evil it might occasion.

But I will now proceed to give the necessary proof to fix the defendant, and wait till I see whether any attempt is made to justify the publication, and on what ground the justification is rested. If necessary I shall have the opportunity of addressing you in reply.

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A witness was then examined, who swore that he bought the different numbers of the work mentioned in the indictment, in the defendant's shop in his presence.

The Defendant addressed the Jury at great length, and with considerable ability, arguing that he was ignorant of the contents

of the book ; that at any rate he had a right to sell it as a bookseller ; that no attack on religion is an offence of which the temporal courts can take cognizance, and that there ought to be no prosecution for any publication, whatever opinions it may express.

### R E P L Y.

GENTLEMEN OF THE JURY, I cannot conscientiously waive my right again to address you. The Defendant has urged no arguments which can legitimately affect your verdict, and I am not afraid of your being misled by his sophistry ; but his speech may be calculated to make an impression on a portion of those who have heard or may read it, and I think by a few observations in answer I may contribute to that great object the satisfactory administration of justice.

He admits that the publications in question were sold at his shop with his privity, and that he knew his name was printed in the title page as one of the London publishers. But he denies that he was aware of their contents, and insists that he is not liable to be prosecuted, because he merely sold them as a bookseller in the way of his trade. Although this, he says, would be an ample defence, he goes farther—tells you that he is a good Christian, and protests that he very much disapproves of the passage I read from the work of Mr. Haslam. Gentlemen, is it possible that he should have sold three editions of a little book like this which he had never read ? Would he consent to be announced as the publisher of a book without enquiring into its character and tendency ? Would a sincere Christian publish a book without reading more than its title page, which professes to treat the subject of religion, and which might offend or mislead thousands of fellow Christians ?—But is it to be endured that such topics should be used in a court of justice ? Upon the evidence laid before you, is not the Defendant morally as well as legally answerable ? Can the liberty of the press exist in any country unless under condition that he who sells a book attacking private character or injurious to



the public may be prosecuted, without proof that he wrote it or that he had read and approved of its contents?

Then the Defendant says his practice in selling Haslam's Letters is like that of the most respectable booksellers who do not hesitate to sell the works of Voltaire, or Rousseau, of Hume or of Gibbon. Unfortunately, there are to be found in some of the writings of these great authors passages unfavourable to revealed religion, but the great bulk of them may be perused with improvement as well as delight by men of education and taste,—to whom they are addressed, and who are capable of detecting errors and false reasonings intermixed with what is sound and salutary. The perusal of such works, upon the whole, is not pernicious, and an attempt to suppress them would be futile and ridiculous.

Gentlemen, if in the discharge of your duty you are obliged to submit to the painful task of perusing these little books, you will find them to consist of one unbroken chain of vituperation of the Bible. They are pure unmixed blasphemy. Their sole and avowed object is, to bring the Christian religion into ridicule and contempt. They cannot be read by any Christian without a shock to his feelings or a subversion of his faith. If not hawked about for the sake of a wretched profit by men like the Defendant, careless from what source profit is derived, they would immediately sink into oblivion. Where then is the resemblance on which the Defendant relies?

But he proceeds boldly to contend, that no attack on revealed religion, however gross, amounts by the law of England to a misdemeanor, and that the contrary doctrine is merely founded on the misconception of a case in the Year Books. The law of England is not justly subject to such an imputation. We are to find the law in the writings of learned men of acknowledged authority and in the decisions of Courts of Justice. In Hale, and in Blackstone, and in all the writers on the law the most venerated, the doctrine repudiated by the Defendant is explicitly laid down, and it has been repeatedly recognized and acted upon by the Judges.

[The Attorney General having cited some passages from the

text writers, and several decided cases on this subject, thus continued.]

These authorities are well collected by the author of a late Treatise on the Law of Libel\* who thus states the result of them. "It appears, therefore, to have been long ago settled, that blasphemy against the Deity in general, or an attack against the Christian Religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offence at Common Law."

Against these *dicta* and decisions are you to take the assertion of the accused on his trial, that there is no such law as that which he is said to have transgressed? A prisoner tried for stealing may as well contend, that by the law of England all things are in common.

But remember, Gentlemen, the distinction between false reasoning against religion—and blasphemy. The former is to be answered; the latter to be put down by the strong arm of the law.

The Defendant argues, that in all cases you should trust to the force of reason, and that no publication on any subject should be proceeded against criminally. What! does freedom of inquiry demand impunity to a book containing a direct incitement to crime—the author of which may be considered an accessory before the fact to the crime he patronizes when committed by those he has misled? May a socialist recommend a redistribution of property and a general insurrection for this purpose? May there be lawfully placarded an exhortation to bring about a change in the Government by physical force? May an enemy to marriage preach up under the sanction of the law the promiscuous intercourse of the sexes, and for furthering his object, exhibit for sale obscene books and prints to corrupt the morals of the rising generation? With regard to religion, I would ask Mr. Hetherington himself, could it be tolerated that he should exhibit a painting in front of his shop in the Strand, attempting to turn into ridicule the passion of our Blessed Saviour,

\* Starkie.

on which we rest our hope of Salvation—with an inscription intimating that Jesus Christ was an impostor? Are we to trust to the force of reason to meet such attacks on property, on social order, on morals, and on religion?

The question then is, where the civil magistrate shall interfere; for no sane man will contend that he is bound to remain passive till criminal incentives have led to criminal acts.

But the Defendant taunts me personally, that having professed liberal opinions and declared myself a friend to the diffusion of useful knowledge, I should conduct such a prosecution. Gentlemen, I at once shelter myself behind the authority of the greatest patriot and the greatest orator who ever adorned our profession,—of course I mean the illustrious Erskine,—who conducted a similar prosecution in this very Court, and who began his address to the Jury by observing that it was consistent with all the principles of civil and religious liberty for which he had struggled and on which he had acted, that he should be instrumental in protecting the young, the ignorant, and the thoughtless, from wanton, ribald, and blasphemous attacks on the sacred truths of religion.

Mr. Hetherington says, that belief is sacred. So say I; but I deny his right to insult the belief of others. I make no inquiry into his private opinions, or what he utters in the social circle, or the precepts he inculcates on his children, or his mode of religious worship. All these matters are between God and his own conscience. But when he distributes a publication which has a direct and necessary tendency to injure others, I have as good a right to invoke the aid of the law to restrain him as if he were tossing about firebrands or discharging poisoned arrows in the midst of a crowded city.

I must not forget his complaint against me, that I pointed out the cheap rate at which these publications are sold as an aggravation of the offence. Gentlemen, I know no greater benefit to the community than the circulation of useful publications at a cheap rate; and the memory of the Nobleman he mentioned, Lord Brougham, will always be cherished for what he has done in this way,—among his other efforts to educate and enlighten the people. But the

mischief, as well as the benefit of a publication, may be according to its cheapness ; and I draw your attention to the low price at which these Letters are sold, as a proof that they were intended for that class who are most likely to be misled and corrupted by them.

Finally, gentlemen, the Defendant tells you he is a martyr!—a martyr to what? not to his opinions, for he entirely differs from the irreligious opinions of the author. If, for nothing personal to himself, for what cause does he suffer?—The cause of free trade in blasphemy!

Gentlemen, if you were to acquit the Defendant, it seems to me that this cause would be triumphant. It would be vain hereafter to institute any such prosecution, and you would proclaim a perpetual impunity for all persons, who, for the sake of a miserable subsistence, choose to deal in publications irreligious, licentious, or treasonable. We have no means of tracing the evils inflicted on society by the circulation of the three editions of this abominable work. But is there not reason to apprehend, that many of the youth of both sexes, confounded by its boldness of assertion, and unsettled by its ribaldry, may have renounced the holy religion in which they were baptised, and which they were taught to consider the foundation of all moral obligation,—may have, in consequence, deviated from the paths of honesty and virtue,—may have forfeited their usefulness and respectability in this world,—and periled their happiness hereafter?

Considering how Christianity is admitted to have softened and refined the human character,—to have promoted purity of morals,—to have fostered the charities of domestic life,—to have excited sympathy for the poor and the unfortunate,—to have enforced subordination and good order,—and to have advanced all the best interests of man as a social being,—even those who doubt,—and (if there are any such,) even those who having examined the evidence in support of it,—disbelieve its divine origin,—must condemn and deplore such insults to it as these. How then are they to be regarded by you and by me, who have been educated in the belief, that Christianity comes from God as his best gift to his creatures,—whose conviction of its truth

has been strengthened and confirmed as we have inquired and reasoned,—who regard its precepts as the only sure guide for our conduct,—who rest our hopes of salvation on its doctrines,—who are prepared to meet death trusting to its consolations,—and who, according to its promises and denunciations, expect in the day of judgment our eternal doom !

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The Defendant was found guilty by the Jury, and afterwards sentenced to imprisonment by the Court.

## ADDRESS.

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ADDRESS in the name of the BAR to MR. JUSTICE LITTLEDALE, on his retiring from the BENCH, delivered in the COURT OF QUEEN'S BENCH, Feb. 8, 1841.

SIR JOHN CAMPBELL, ATTORNEY GENERAL,

MR. JUSTICE LITTLEDALÉ, it having been intimated to the Bar that we are not to have the satisfaction of again seeing you on the Bench, I am deputed by their unanimous voice to express to your Lordship the deep sorrow they feel at this separation. Notwithstanding their entire confidence in the residue of the Court, they most sincerely regret that they should be deprived of a Judge of such profound learning, distinguished acuteness, and spotless integrity,—who during the many years he has occupied the judgment seat in this Court and on the circuits,—while he has ever displayed the utmost impartiality and independence,—yet, from the kindness of his nature, has never given offence to a human being.

Though still in the full enjoyment of the high faculties which it has pleased God to bestow upon you, they are sensible that from your eminent services to your country, you are well entitled to the dignified leisure to which you now gracefully retire.

In that retirement we earnestly hope that you will long enjoy health and happiness. We rejoice to think that you will find occupation and delight in the renewed pursuit of those abstruse as well as elegant studies in which you early gained distinction, and which have been interrupted by your devotion to your professional and judicial duties.

We beg leave to assure your Lordship that you carry along with you the gratitude and good wishes of every member of the profession of which you have so long been a distinguished ornament, and that we shall ever think and speak of you with feelings of respect and affection.

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MR. JUSTICE LITTLEDALE returned thanks with great feeling, expressing his deep sense of the assistance he had received from the advocates practising before him in the discharge of his judicial duties, and concluding with the hope that the English Bar would ever display the learning, independence and integrity, by which it had been characterized in his time.

# EQUITY REFORM.

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ADDRESS to the BAR in the COURT of CHANCERY in IRELAND  
at the conclusion of the Sittings on the 17th day of July,  
1841.

LORD CHANCELLOR,

As there are no other causes, petitions or motions to be disposed of, the sittings will now close ; and I think it proper to mention to the Bar, that I purpose forthwith very deliberately and anxiously to consider how far the procedure of the Court may be further simplified and improved.

I have the satisfaction to find, that where the Chancery practice is different in Ireland and in England, that which is established here is in various instances to be preferred,—as discarding useless forms, and speeding the suit to a hearing. The mode of enforcing decrees in mortgage suits is likewise much more effectual.

In the abolition of the Six Clerks' Office, an example has been set, which England will do well to imitate. This change I have every reason to believe has here proved a great relief to the suitors, and has materially facilitated the conduct of business among the solicitors.

But there can be no doubt that both in England and Ireland the



administration of justice in Courts of Equity may be still greatly improved by increased expedition and diminished expense.

While for grievances redressed by the Courts of Common Law, a speedy and comparatively cheap remedy is afforded, it must be admitted that where demands are of a *fiduciary* nature, so that they can only be enforced in a Court of Equity, the delays are often most harassing, and the costs often are so great in proportion to the sum to be recovered, that the more prudent course is to submit to wrong, and to give a triumph to fraud.

One great cause of this evil is the prolixity of the written pleadings in a suit, which is generally begun by the plaintiff in his bill very tediously telling his tale three times over,—an abuse which occasions proportionate length in all the subsequent proceedings. I know it is the opinion of men of the greatest eminence and experience, that a simple statement of the facts on which the plaintiff asks for equitable relief would be quite sufficient, and that the other parts of the bill are superfluous.

But I believe that in various cases where property is to be administered by the aid of the Court, bills and answers may be entirely dispensed with, and that upon a short petition there may at once be a reference to the Master. The time and expense thus saved in creditors suits and others of the same description it would be difficult to calculate without seeming exaggeration.

In these reforms I know that I shall have the warm and generous support of the Bar. In the alterations I have been instrumental in introducing into the law of Real Property and the law of Debtor and Creditor in England,\* I was zealously seconded by all branches of the profession there, and here I may confidently look for equal intelligence and equal disinterestedness.

My great reliance, however, must be on the advice and co-operation of that accomplished lawyer Sir Michael O'Loughlin, the Master of the Rolls,—equally distinguished for the soundness of his decisions on the bench, and the aptitude he has displayed for the improvement of our juridical institutions.

\* See ante, p. 430.

I do not forget that before I have completed this important undertaking I may be reduced to a private station : but this can be no sufficient reason why I should not zealously enter upon it. The high office which I have now the honour to hold, I shall be ready at any time to lay down,—with the consciousness that while I held it, I intended well. The best preparation for adverse fortune is an honourable use of prosperity whilst it continues.

“Laudo manentem. Si celeres quatit  
Pennas, resigno quæ dedit—  
———— probamque,  
Pauperiem *sine dote* quæro.”

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NOTE.—Equity Reform has fallen into abler hands, and I have no reason to doubt that the object will be prosecuted with zeal and intelligence. In addition to the suggestions contained in the above address I would beg leave respectfully to observe for the consideration of those now superintending the administration of justice in our Courts of Equity, that the most pressing defect remaining to be remedied is the manner in which business is still conducted in the Masters' offices,—without any blame being imputable to the meritorious functionaries who preside there. From the addition to the judicial staff by the appointment of two new Vice Chancellors, there is every reason to hope that causes will henceforth be heard shortly after they are set down for hearing ; but it often happens that the order made on the hearing, instead of deciding the cause, like a judgment at law,—is only the first stage in a long litigation. Even where the Equity Judge disposes of all that he can fairly decide, and does not hurry on by *affected despatch*, there must frequently be references to the Master, involving intricate questions of fact, and nice questions of law. However zealous and competent the Masters may be, they cannot satisfactorily get through the matters referred to them under the present system of warrants, voluntarily applied for, and voluntarily abandoned. They must

is armed with the power to appoint causes to be heard before them, and peremptorily to proceed when the causes are called. Suppose the solicitors to attend punctually and to be inclined to expedite the suit,—was there ever anything more absurd than that a judicial inquiry, which is to last many days, should never be prosecuted more than half an hour or an hour at one time? A considerable portion of each sitting must be consumed in recalling what has been done at former meetings, and all vigorous application is prevented from the hopelessness of coming to a conclusion. But it is notorious, that after a reference to the Master, a suit which might be speedily despatched, is often allowed to go to sleep for years, and that when warrants have been taken out,—from the want of clerks in proportion to the business to be done,—from negligence,—from a wish between the solicitors reciprocally to accommodate—the appointment proves entirely abortive, and the Master's time is completely wasted. The delay and expense thus occasioned will continue ruinous to many suitors till a more efficient system shall be adopted.

But for permanent reform in every department of the law, the grand problem is to find out a mode to recompense legal practitioners irrespective of the length of writings to be drawn in the course of legal proceedings. I pointed out this in my speech in the House of Commons on a General Register of Deeds, in the year 1830,\* and it has not been solved. But while length is the measure of pay, it will be vain to lay down rules against prolixity. The power of lawyers to condense, when they have no interest to lengthen, may be illustrated by the fact, that the written judgment on which a prisoner capitally convicted is executed, consists of three words, two of which are abbreviated—*per coll.*"

I am strongly inclined to think that Bills of Costs ought to be required to be made out according to the importance of the cause and the time bestowed upon it,—taking care for the public good that the remuneration of the solicitor shall be liberal. Vesting a

\* Ante, p. 430.

great degree of discretion in an experienced and enlightened taxing officer, Bills of Costs, I conceive, might be taxed without the mechanical rule of so much a folio of so many words.

I am aware that it is unpalatable to clients to pay for a mere attendance where there is nothing in writing to be charged, and that they do not grudge heavy disbursements when there are cumbersome papers to be exhibited to them; but it is sometimes the duty of the Legislature to guard people against the effects of their own folly and ignorance.

I have heard it seriously objected by very eminent persons, that if deeds and legal proceedings were reduced to their proper dimensions, there would not only be a great falling-off in the revenue from stamps, but the fees in courts of justice regulated by length, from which compensations and the salaries of Judges and officers are paid, would be found wholly inadequate to the purposes to which they are appropriated.—Ought fiscal considerations to stand in the way of legal improvement? Is the State, in a pettifogging spirit, to combine with those who for their private gain resort to needless prolixity? The same amount of revenue might be raised with much less vexation to the subject by an *ad valorem* duty on sales, and by demanding from the party whose wrong has occasioned the litigation a small sum proportionate to the amount of property in controversy. I think it is highly reasonable that the fair expenses of Courts of Justice should be defrayed by those whose misconduct renders them necessary; but there can be nothing more iniquitous than to tax juridical proceedings, either to swell the public revenue or to create sinecures for individuals.

THE END.

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LONDON:

THOMAS CURSON HANSARD, PATERNOSTER-ROW.













